

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1911.

No. 2331.

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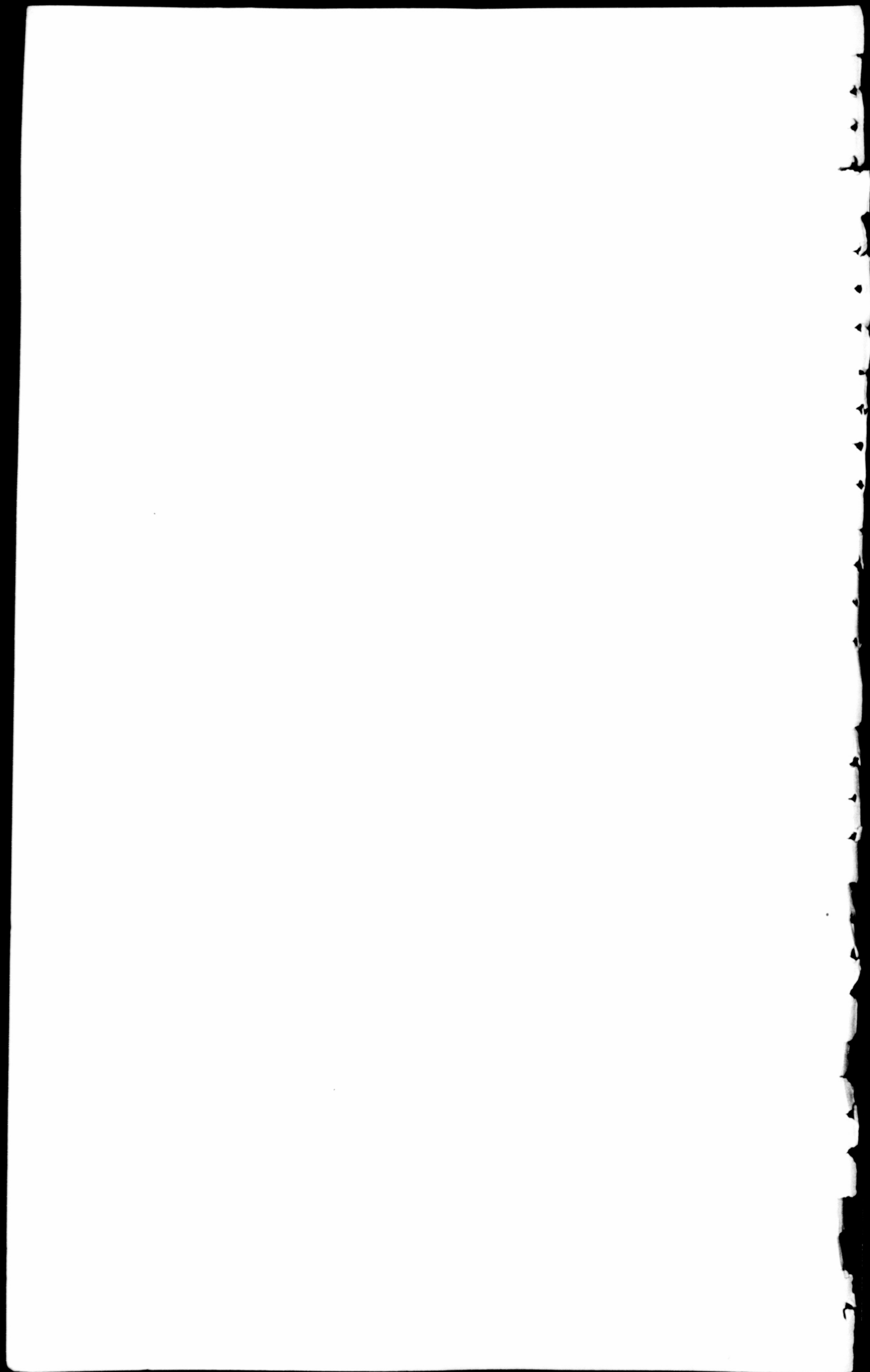
LEO SIMMONS, APPELLANT,

vs.

EMILIO JASELLI, TRADING AS E. JASELLI & BROS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JULY 27, 1911.



COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1911.

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APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2331.

LEO SIMMONS, Appellant,
vs.
EMILIO JASELLI, Trading as E. Jaselli & Bros.

a Supreme Court of the District of Columbia.

Law. No. 52255.

EMILIO JASELLI, Trading as E. Jaselli & Bros., Plaintiff,
vs.
LEO SIMMONS, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed December 29, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 52255.

EMILIO JASELLI, Trading as E. Jaselli & Bros.,
vs.
LEO SIMMONS.

1. The plaintiff, Emilio Jaselli, trading as E. Jaselli & Bros., sues the defendant, Leo Simmons, for money payable by the defendant to the plaintiff for work and labor done and materials furnished by the plaintiff to the defendant on divers dates to wit between July 30th, 1909, and October 30th, 1909, the said work, labor and materials being more particularly described in the annexed bill of particulars marked "Exhibit A." That the defendant promised

to pay to the plaintiff for said work and labor done and materials furnished the sum of \$300.00, but although often demanded, the defendant has not, nor has any one for him paid the said sum or any part thereof.

Wherefore the plaintiff claims \$300.00 besides costs.

2. The plaintiff, Emilio Jaselli, trading as E. Jaselli & Bros., sues the defendant, Leo Simmons, for other money payable by the defendant to the plaintiff for work and labor done and materials furnished by the plaintiff to the defendant on divers dates, to wit, between July 30th, 1909, and December 18th, 1909, the said work, labor and materials being more particularly described in the annexed bill of particulars marked "Exhibit B." The defendant promised to pay to the plaintiff for said work and labor done and materials furnished the sum of \$223.00, but although often demanded the defendant has not, nor has any one for him, paid the said sum, nor any part thereof.

Wherefore the plaintiff claims \$223.00 besides costs.

3. The plaintiff, Emilio Jaselli, trading as E. Jaselli & Bros., sues the defendant, Leo Simmons, for other money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them.

Wherefore the plaintiff claims \$523.00 besides costs.

H. WINSHIP WHEATLEY,

Attorney for Plaintiff.

Notice to Plead.

3 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof, otherwise judgment.

H. WINSHIP WHEATLEY,

Attorney for Plaintiff.

Affidavit.

DISTRICT OF COLUMBIA, ss:

Personally appeared before me Emilio Jaselli, who being first duly sworn, upon his oath declares and says that he is the plaintiff in the above entitled suit, and is doing business under the name of E. Jaselli & Bros. That he has read the declaration filed herewith in said Court on the 29th day of December, 1909, wherein Emilio Jaselli, trading as E. Jaselli & Bros., is the plaintiff, and Leo Simmons is the defendant. That the said defendant named in said declaration is justly indebted to the plaintiff in the full sum of \$523.00.

That \$300 of said indebtedness is for work and labor done and materials furnished by the plaintiff to the defendant, at the latter's request, on divers dates to wit, between July 30th, 1909, and October 30th, 1909. That said work and labor done and materials furnished were ordered by the defendant from the plaintiff, and said work, labor and materials will more particularly appear by the annexed particulars of demand, marked "Exhibit A,"
 4 to which reference is hereby made. That the said work and labor done and materials furnished were of the value of \$300.00, and the defendant promised to pay to the plaintiff for same the said sum of \$300, but the defendant has not, nor has any one for him, paid the said sum nor any part thereof.

That the balance of said indebtedness is for work and labor done and materials furnished by the plaintiff to the defendant, at the latter's request, on divers dates to wit, between July 30th, 1909, and December 18th, 1909. That said work and labor done and materials furnished were ordered by the defendant from the plaintiff, and are more particularly described in the annexed particulars of demand, marked "Exhibit B," to which reference is hereby made, and the said work and labor done and materials furnished were of the value of \$223.00, and the defendant promised to pay to the plaintiff for same the said sum of \$223.00, but the defendant has not, nor has any one for him, paid the said sum nor any part thereof.

That in consideration of the premises there is now due and owing by the defendant to the plaintiff the full sum of \$523.00, exclusive of all set offs and just grounds of defense.

EMILIO JASELLI.

Subscribed and sworn to before me this 29th day of December, 1909.

[SEAL.]

ALEXANDER H. GALT,

Notary Public.

5

EXHIBIT A.

For stucco work on the exterior front and side walls of Mintwood place Apartment houses. The Knockerbocker	\$300.00
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EXHIBIT B.

For plastering interior of Knockerbocker Apartment House in Mintwood place.....	\$1900.00
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Credits:

Sept. 14th. Cash	600.	
10th. "	200.	
25th. "	200.	
Oct. 1st. "	300.	
9th. "	125.	
56 thousand laths @ 4.50 per M.	252.	
	—	1677.00
Balance		<u>\$223.00</u>

Pleas.

Filed January 22, 1910.

* * * * *

Now comes the defendant, Leo Simmons, and for plea to the first count of the plaintiff's declaration, says that he did not promise in manner and form as alleged:

2. And for plea to the second count, the defendant says that he did not promise in manner and form as alleged:

3. For plea to the third count of the plaintiff's declaration, the defendant says that he did not promise in manner and form as alleged.

A. A. BIRNEY,
Att'y for Defendant.

DISTRICT OF COLUMBIA, ss:

Personally appeared Leo Simmons, and being duly sworn says: that he is the defendant named in the foregoing declaration:

That he is not indebted to the plaintiff in any sum or manner whatever: that the said plaintiff, personally or trading as E. Jaselli & Bros., never performed any labor for, or at the request of the defendant: nor did he, personally or trading as E. Jaselli & Bros., furnish any materials for or at the request of the defendant or for his use.

That the work mentioned in the bill of particulars and in the affidavit attached to the plaintiff's declaration was done by the firm known as The Italian Plastering Company consisting of one Stefano Lozupone, the plaintiff and others, and for such work the defendant paid said firm The Italian Plastering Company in full for all it did for him, and he does not owe the plaintiff nor said Italian Plastering Company anything whatever.

LEO SIMMONS.

Sworn to before me this 21 day of January, 1910.

S. A. TERRY,
Notary Public.

[SEAL.]

Joinder of Issue.

Filed February 1, 1910.

* * * * *

The plaintiff joins issue upon the defendant's pleas.

H. WINSHIP WHEATLEY,
Attorney for Plaintiff.

Memorandum.

February 9, 1911.—Verdict for Plaintiff for \$523.00.

Opinion of Court.

Filed March 3, 1911.

* * * * *

The declaration in this case consists of three counts, all based upon the common counts for money payable by the defendant to the plaintiff, and for work and labor done, and materials furnished, by the plaintiff for the defendant.

The first count is for \$300, and has a bill of particulars annexed marked "Exhibit A". The second count is for \$223, with a bill of particulars annexed marked "Exhibit B". The third count is for money, etc., in which the plaintiff claims \$523.00, and is not accompanied by any bill of particulars.

The pleas filed to these several counts of the declaration are that the defendant did not promise in manner and form as alleged. Issue was joined on these pleas; and the case thereafter came on for trial before the court and jury, and a verdict was rendered for the plaintiff for the full amount of \$523.00, as claimed.

The defendant has filed a motion for a new trial, on the grounds that the verdict is contrary to the evidence, and upon exceptions taken to the rulings of the Justice during the trial.

The plaintiff testified that he did work as a contractor of plastering, and sometimes used the name, "The Italian Plastering Company", but that he, himself, was the said company. That his method of doing business was to employ some Italian Plasterers to do the work, he alone taking the contracts, and agreeing to pay them wages at stipulated sums, \$4.00 a day for some of them, and \$5.00 for the foreman, provided he made money enough out of the contracts to pay such wages.

That he made an estimate or bid for doing the work for the defendant on the apartment house on Mintwood Place, using the name of the Italian Plastering Company. That the bid was not accepted; but that afterwards he and the defendant agreed on a price for doing the inside plastering on said house, to wit, \$1,900, and the defendant prepared a contract, in duplicate, which was to have been signed by the plaintiff by the firm name of E. Jaselli & Brothers, in which name he was doing business as a merchant. That the defendant would make no contract with the Italian Plastering Company, or with the men who were to do the work; but preferred to make a personal contract with the plaintiff; and the defendant, in drafting the said contract, used this language:

"This contract made this thirtieth day of July, 1909, by and between Leo Simmons, of the first part, hereinafter known as the owner, and E. Jaselli & Brothers, hereinafter known as the contractors," etc.

That the plaintiff signed one of the duplicate copies of the contract, by the name of the Italian Plastering Company, and left it with the defendant, who afterwards signed the same; and Mr. Simmons signed the other copy, and left it with the plaintiff, who afterwards signed it by the name of E. Jaselli & Brothers.

10 The defendant's counsel contend that the contract was executed by the defendant with the Italian Plastering Company as a firm, and that it consisted of the plaintiff and three others; and the suit having been brought by the plaintiff alone, that a judgment of non-suit should be entered for want of proper parties.

The payments that were made by the defendant were made by checks given by the defendant to the plaintiff, one of them reciting that it was for the Italian Plastering Company, but most of the checks do not mention the name of the Italian Plastering Company in any way.

A letter was also introduced from the defendant, Simmons, to the plaintiff, by the name, E. Jaselli, Esq., in which the defendant found fault with some of the work done, and requested the plaintiff to send a man to point up, and do some other work about the building and in which letter he says, "unless the work is attended to more properly, I shall exercise the right to charge you \$10 a day forfeit as provided in your contract, even if the work is accepted by me when you are through with same."

There was no dispute between the plaintiff and the defendant as to the amount of money that had been paid, but the plaintiff claimed that \$300 paid at one time, was to be applied on the written contract work which was to be done for \$1,900, and the defendant claimed that it was to be for extra work on the outside of the building, known as stucco work, which had been verbally agreed upon after the written contract had been executed. If the credit was properly made for inside work, then there was no dispute about the \$300 for the outside work being still due; but if it should have been applied in payment of that extra work, then the plain-

11 tiff's claim, if he was entitled to full payment under the contract, would necessarily have included the \$300 on account of the inside work.

No bill of particulars was asked for under the third count of the declaration, and whether the \$300 was due on account of the stucco work on the outside, or on account of the work on the inside, it might be recovered under that count if the plaintiff's case was properly made out.

It does not appear from the evidence that the Italian plasterers who did the work for the plaintiff, had any financial responsibility in the matter. The plaintiff claims that he was to finance all contracts that he made, advance sufficient moneys to supply the laborers with a living while the work was in progress, and when the money was received under any contract that he might take, if the amount earned justified it, he was to pay them the full wages.

There was some evidence that might tend to show that in addition to their full wages, these men were to have a share of the surplus, if any, after the plaintiff had received wages; but the testimony is too vague and uncertain in that direction to warrant a conclusion that there was a definite contract of that kind; and all the circumstances surrounding the case seem too uncertain to warrant the court in deciding, as matter of law, that there was a partnership. There

was no evidence that the men who did the work were to pay any part of the losses, and they had no power of agency to bind the plaintiff, such as each partner usually has to bind other members of a firm.

12 It is often a difficult matter to determine whether a certain contract is one of partnership, or not. Whether the relation between contracting parties constitutes a partnership or not, depends upon their intention in the execution of such contract. If the parties have agreed not to be partners, they are not, whatever may be their responsibilities otherwise, and the intention of the parties will be determined from the effect of the whole contract.

There seems to be no absolute rule to ascertain the presence of an intention to create a partnership. Mutual agency has been declared to be a test of such intention, for it is usually characteristic of all partnerships that any one who is a constituent part of the partnership, is authorized to bind the other persons, as agent, in all matters connected with the partnership business.

The facts, as shown by the testimony in this case, in connection with all the circumstances and conduct of the parties, do not, in my judgment, furnish sufficient proof to establish the existence of a partnership.

Again, the circumstances of the contract, and the conduct of the parties in reference to it, and to the work, were such, as to show that even if there was a partnership, it was not the intention that the contract was to be made with that partnership, but that it was to be made with the plaintiff alone.

Under all the evidence and circumstances, the court deemed it proper to leave to the jury the question as to whether there was a partnership in fact, and if there was such a partnership, whether or not the contract was made with the firm, or with the plaintiff in his individual capacity. The court therefore told the jury that

13 if they should believe from the evidence that there was a partnership between the plaintiff and any of the other gentlemen named in the testimony, and that the contract to plaster the defendant's house was made with that partnership, then the plaintiff could not recover, because the other partners were not joined as plaintiffs, no matter what the condition of the work might be. The court also told the jury that if they should find there was no partnership in fact; or, if there was a partnership in fact, but the contract was made by the plaintiff alone; and if they should further find that the work was done as agreed upon, in good condition, then the plaintiff would be entitled to recover; but if they found that the work was not properly done as agreed upon, but that it was defective, and that the plaintiff had already been paid all that the work so done was fairly worth, then their verdict should be for the defendant. The court also told the jury, that if they should find for the plaintiff, and that the work was defective, not according to the contract in quality, but yet was fairly worth more than the plaintiff had been paid, their verdict should be for the balance fairly due him for such work, within the sum claimed in the declaration.

Of course the court does not know on what theory the jury found

in favor of the plaintiff, or what their opinion might have been with reference to the existence of a partnership. If they found the contract in fact to have been made with the plaintiff alone, it seems to me to have been immaterial as to what their view would be with reference to the partnership; and it seems to me that the jury were warranted in finding that it was the intention, both of the
14 plaintiff and the defendant, that the contract should be between them, and not with the alleged members of the partnership.

The contract being drafted by the defendant, would be construed most strictly against him, and the plaintiff testified that the defendant objected to making any contract except with the plaintiff.

If the plaintiff is correct in his testimony, that he constituted the Italian Plastering Company, then it can make no difference that the copy of the contract left with Mr. Simmons was signed by that name, the body of the contract reciting that it was between Jaselli and Simmons. The copy that was left with the plaintiff would have been binding on the defendant if it had been signed by no one except the defendant, provided it had been accepted by Jaselli; and the fact that he signed that after it was left with him, in the name of E. Jaselli & Brothers, adds nothing to the obligation of the defendant, and becomes immaterial.

It seems to me that the case was fairly left to the jury on the merits, and that they had a right to hold that the contract was intended to be made between the plaintiff and defendant, and that therefore the plaintiff had a right to bring the action as he did.

As to the application of the payments, the jury could believe either the testimony of the plaintiff, or that of the defendant, which ever they might properly conclude was most likely to be correct, and the court could not disturb the verdict on that account.

It is claimed by counsel for the defendant that the sum of \$10
15 per day should be deducted, in any event, from the claim of the plaintiff for the time after the contract should have been completed before it was completed; but a proper answer to that seems to be that the evidence tended to show that the delay was occasioned by the building not being ready for the plasterers; and that it was not insisted upon by the defendant when the work was done and was accepted; and that the language of the contract in that respect is such as to make it appear that the \$10 was simply to be forfeit money, or a penalty to insure prompt work on the part of plaintiff, and was not agreed upon as liquidated damages which might be allowed; and that such an allowance would be improper because there was no claim of that kind made in the pleadings.

Looking at the whole case, I am disposed to think that the jury were justified in rendering the verdict they did, and I will therefore overrule the motion.

JOB BARNARD, *Justice*.

Supreme Court of the District of Columbia.

FRIDAY, *March* 3d, 1911.

Session resumed pursuant to adjournment. Hon. Job Barnard, Justice presiding.

* * * * *

16 Upon consideration of defendant's motion for a new trial filed herein and heretofore argued and submitted, it is ordered that said motion be, and the same is hereby overruled and judgment on verdict is ordered; whereupon it is considered that the plaintiff herein recover of defendant herein the sum of Five Hundred and Twenty-three Dollars (\$523.00) with interest from this date, together with costs of suit to be taxed by the clerk, and have execution thereof.

Order for Appeal.

Filed March 4, 1911.

* * * * *

The Clerk of said Court will note an appeal in this case to the Court of Appeals, from the judgment entered herein against the defendant on the 3d day of March 1911, & issue citation to appellee.

LEO SIMMONS, *in p. p.*

17 In the Supreme Court of the District of Columbia.

At Law. No. 52255.

EMILIO JASELLI, Trading as E. Jaselli & Bros.,

vs.

LEO SIMMONS.

The President of the United States to Emilio Jaselli, trading as E. Jaselli & Bros., Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal filed in the Supreme Court of the District of Columbia, on the 4th day of March, 1911, wherein Leo Simmons is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this fourth day of March, in the year of our Lord one thousand nine hundred and eleven.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,

By ALF. B. BUHRMAN, *Ass't Clk.*

Service of the above Citation accepted this 4th day of March, 1911.

H. WINSHIP WHEATLEY,
Attorney for Appellee.

[Endorsed:] 8. No. 52255. Law. Jaselli vs. Simmons. Citation. Issued M'ch 4", 1911. Served cop— of the within Citation on ————, Marshal. A. A. Birney, Attorney for Appellant.

18

Memoranda.

March 16, 1911.—Supersedeas bond approved and filed.

April 5, 1911.—Time to submit exceptions extended to April 26, 1911.

April 17, 1911.—Bill of Exceptions submitted.

May 16, 1911.—Time to file record extended to, and including, June 30, 1911.

Supreme Court of the District of Columbia.

TUESDAY, *June 6th*, 1911.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice presiding.

* * * * *

The Court having this day signed the Bill of Exceptions heretofore submitted herein, now orders the same of record as of the time of the noting thereof at the trial.

19

Bill of Exceptions.

Filed June 6, 1911.

* * * * *

Mr. H. Winship Wheatley, Attorney for Plaintiff:

I herewith this 12th day of April, 1911, submit you a copy of the Bill of Exceptions in the above entitled cause, and you will please take notice that on Tuesday, the 25th day of April, 1911, we will appear before Mr. Justice Barnard, who presided at the trial of the case, and ask that said bill of exceptions, be signed, approved and made a part of the record.

A. A. BIRNEY,
Attorney for Defendant.

Copy of Bill of Exceptions received Apr. 13, 1911.

H. WINSHIP WHEATLEY,
Att'y for Pl'tff.

* * * * *

Be it remembered, that at the trial of the above entitled cause the plaintiff to prove the issues on his part, testified on his own behalf and in substance as follows:

That his business was that of grocer and liquor dealer; was in the plastering business about a year; had business with the defendant; being shown a paper dated the 30th day of July, 1909, 20 said he signed it, and performed the work pursuant to the contract; bought the materials for work from, sand of Columbia Sand & Dredging Company; lime and hair from National Mortar Company; I don't remember the name of the company I bought laths of; first class lime; had experience before in plastering on the house of his, defendant's son; defendant was very much pleased with the work done for son. The white coat plastering done was in first class condition; there were cove ceilings in the room designated by the contract, not in all the rooms.

Q. Where did you put sand finish? A. In the halls and kitchens and corridors. It was supposed to be sand finish ordered by him; it was in first class condition, like the Kalorama; the condition of the work generally was first class, in comparison to the contract; defendant paid me a certain amount of the contract for the inside work, but did not pay anything for the outside work, the stucco work. Payments were made by defendant in accordance with the Bill of Particulars. Payments of \$1677. were on inside work only, no payments made on outside work. Talked with defendant several times after last payment about the character of the work; in his office a dozen times. I went there to get the balance as the work was completed. He told me the ceiling in the basement had not been plastered; I asked him if he wanted basement plastered, he said, I left that work out; when I went for the balance \$520., he said "Jaselli, you did not plaster the ceiling in the basement, and it has to be done," I went and plastered the ceiling, ordered one coat put on, that didn't cover the laths very well, and when I went back for money again he said, "you 21 can see the laths in the plastering there, that is not what I call plastering." I then went up there with him and he showed me what he wanted; put on another coat, then he said "well, elevator is not finished yet." I told him the inspectors wouldn't allow me to work on the elevator until they got the elevator in, because the house wasn't complete. There was no elevator nor radiators, and people were living there already. People had engaged apartments but house was not ready. The plastering was finished. I had to wait until I had orders to plaster the elevator, that is, until he had orders; then I plastered the elevator. He then found fault with the elevator, said it did not look right. I ordered the men to put another coat in the elevator. After that was done I went for my money, and he told me that my men broke the elevator shaft; my men didn't know anything about it. Said it was new to them. Defendant said I would have to pay for that shaft; told him I had not broken it and would like to get money for the contract; he said he was going to charge me for some of the work, that I ought to take something off the contract, I told him I couldn't take anything off the contract, he said he was going to investigate about the shaft more carefully and to come back tomorrow or the following day. Next time he said the painters

tell me the plastering in the hall is not good, it took three or four coats of paint there, and it is dried in, and I said "it is a sand finish and absorbs the paint." He said the sand finish is not right. I said I was willing to go back and break down whatever you say is not right and fix it up; he got all excited and said "Do you suppose I am going to let you go there and upset my apartment and break down that plastering?" so I said then, "if you
22 are satisfied, then settle up."

Defendant made no complaint whatever about breaking around doors; he was pressing me to have the work completed. There was some mouldings to be put on, which we had to work out ourselves, that was the only thing; plastering around doorway was not more broken than natural breaking which carpenters make while knocking at the wood work. The wood work put there was unusually hard wood for that sort of plastering. He put on heavy wood which requires a lot of knocking, and the carpenters at times knocked the plastering from the walls. Yes, he asked me to fix that, and I fixed it. That was after the carpenters' work and the work was complete except pointing up. He wouldn't allow me to plaster the elevator shaft first; said the elevator people had to do something there. It was about a month after the plaster was completed that he complained about it; work was complete because they painted. He saw the plastering done; was there nearly every morning; made no complaint. It was exactly the same plaster as in the other apartment house I did for his son. He asked me to do the stucco work after I had signed for the inside work. We agreed on \$300. Never found any fault with it; paid me nothing for it.

Q. Have you repeated to the Court and jury all the faults that Mr. Simmons had to find with this work? A. I did. It has just come to me he tried to complain of the sand finish in the kitchens; rather than have any trouble I didn't charge him anything for it. He wanted the kitchens sand finished so he could paint them; that is not included in the suit. Went there recently to examine the
23 place; he said I couldn't go in the rooms; I examined all the plaster I could see and found it was in good condition.

Thereupon the plaintiff offered in evidence the following paper writing, dated June 30, 1909:

This contract made this 30 day of July, 1909, by and between Leo Simmons of the first part, hereinafter known as the owner, and E. Jaselli and Brothers, hereinafter known as the contractors:

Witnesseth, that said parties have agreed together as follows that is to say, that the said Jaselli and Brothers have agreed to provide all the necessary materials and do the plastering work on a certain building on Mintwood Place, between 18th and 19th streets in Washington Heights, for the sum of one thousand nine hundred dollars (\$1,900) to be paid the said Jaselli and Brothers, when the work is completed satisfactory to Leo Simmons or such other person as may be designated by him to inspect and pass upon same; said work to be done in what is known as laid on two coat work; finished with a hard smooth white finish.

The materials to be furnished for the plastering shall be as fol-

lows: the mortar for such plastering shall be composed of clear, sharp down river sand, wood burnt screened lime, mixed in such quantities so as to make first class job of work; the laths shall be #1 Spruce, well dried; the white coating shall be of screened lime and plaster of paris; all the public halls, parlor, reception hall and dining room in front apartments, first floor, and all living rooms in other
 24 apartments to have cove ceiling and plaster molding like hall in Kalorama; all the bathrooms and public halls to be finished in what is known as a "sand finish." All the work throughout the entire job is to be plumb, straight and well trow-led, all pilasters to be made parallel and equal in dimension. The roughing on coat shall be well supplied with long hair; the lime and hair to be furnished by Knott & Moler.

It is further agreed that the owners shall furnish the lath for said work and deduct the price of same at the rate of \$4.50 per thousand from said sum of \$1,900.00. The sand, lime and plaster, hair and lathing nails shall likewise be furnished by the owner at the regular market price and likewise deducted from said contract price of \$1,900.00.

Work to be begun at once and completed within thirty working days.

And it is further agreed that if the work is not completed in said time, the said Jaselli Brothers shall forfeit to the owner the sum of \$10.00 per day, for each day, including Sundays, the work shall remain unfinished.

E. JASELLI & BROS.
 LEO SIMMONS.

The defendant objected to the introduction of the paper until he examined the witness in relation thereto, and thereupon asked the following questions and received the following answers:

25 Q. Is that your signature, handing the witness the following paper:

This contract made this 30 day of July, 1909, by and between Leo Simmons of the first part, hereinafter known as the owner, and E. Jaselli and Brothers, hereinafter known as the contractors.

Witnesseth that said parties have agreed together as follows: that is to say, that the said Jaselli and Brothers, have agreed to provide all the necessary materials and do the plastering work on a certain building on Mintwood Place, between 18th and 19th Street- in Washington Heights, for the sum of one thousand nine hundred dollars (\$1,900) to be paid the said Jaselli and Brothers when the work is completed satisfactory to Leo Simmons or such other person as may be designated by him to inspect and pass upon same; said work to be done in what is known as laid on two coat work; finished with a hard smooth white finish.

The materials to be furnished for the plastering shall be as follows: the mortar for such plastering shall be composed of clear, sharp down river sand, wood burnt screened lime, mixed in such quantities so as to make first class job of work; the laths shall be #1 Spruce, well dried; the white coating shall be of screened lime and plaster of

paris; all the public halls, parlor, reception hall and dining room in front apartments, first floor, and all living rooms in other apartments to have cove ceiling and plaster molding like hall in
 26 Kalorama; all the bathrooms and public halls to be finished in what is known as a "sand finish." All the work throughout the entire job is to be plumb, straight and well trow-led all pilasters to be made parallel and equal in dimensions. The roughing on coat shall be well supplied with long hair; the lime and hair to be furnished by Knott & Moler.

It is further agreed that the owners shall furnish the lath for said work and deduct the price of same at the rate of \$4.50 per thousand from said sum of \$1,900.00. The sand, lime and plaster, hair and lathing nails shall likewise be furnished by the owner at the regular market price and likewise deducted from said contract price of \$1,900.00.

Work to be begun at once and completed within thirty working days.

And it is further agreed that if the work is not completed in said time, the said Jaselli Brothers shall forfeit to the owner the sum of \$10.00 per day for each day, including Sundays, the work shall remain unfinished.

ITALIAN PLASTERING CO.,
 By E. JASELLI & BROS.
 LEO SIMMONS.

A. The "E. Jaselli & Bros." is mine, yes, the handwriting above it is mine too. Mr. Simmons didn't sign this contract at that time he signed my contract. Yes sir, this, referring to the paper
 27 shown him, is the contract I left with him. Yes, I signed this at that time. Mr. Simmons signed the one he gave me, (one offered by plaintiff) and he didn't sign that contract (one exhibited by defendant) at that time, he didn't sign it in my presence, he was in a hurry to get away. He signed the one he gave me, and I signed the one he kept.

Q. Then after you got away you signed this one that he had given you? A. No, I signed that afterwards; yes, I signed the one he gave me afterwards. The one Mr. Wheatley offered in evidence.

Q. This one you left with Mr. Simmons for him to sign? A. Exactly, he had signed that one, yes in my presence.

Thereupon counsel for defendant objected to the paper produced by the plaintiff, and first offered in evidence, contending that the second one (signed by Jaselli for the Italian Plastering Company) was the contract and the other could not be received in evidence for the reason that the signature of the plaintiff was put to same out of the presence of the defendant and was not signed like the paper left with the defendant, as the contract between the parties; but the Justice presiding overruled said objection saying "I think both papers should go in and we will see what the effect of this paper is," and thereupon permitted the paper offered by the plaintiff with the other paper, to be read in evidence to the jury to which ruling counsel

for defendant then and there duly excepted. And thereupon
28 said papers were both read to the jury.

The plaintiff then offered in evidence the following letter dated October 5, 1909:

WASHINGTON, D. C., *Oct. 5th*, 1909.

E. Jaselli, Esq., 2118 Pa. Ave. N. W., City.

DEAR SIR:—I wish you would send a man to the Mintwood Place apartment house at once to do some pointing up which is necessary in order that the trimming can be put on the doors and windows. This could ordinarily wait until the trimming is done, but the plastering which you have done there is in such a rotten condition, it falls down in nailing up the door jambs, and in many places it will be impossible to point it up properly after the trimming is nailed up. It will be well for you to put some plaster of paris or cement in the mortar, in order that it will set up quick, and not delay the man in putting on the trim.

I was at the building today and did not find any of your men there at all, and unless the work is attended to more properly, I shall exercise the right to charge you \$10 a day forfeit as provided in your contract, even if the work is accepted by me when you are through with same.

Yours very truly,

LEO SIMMONS.

The signature of the defendant to the above letter being admitted.

29 Thereupon the plaintiff testified further in his own behalf as follows: I told him I was the Italian Plastering Company; he said he had looked us up and he wouldn't give it to the Italian Plastering Company; I told him I would make myself personally responsible; and I would take the contract in my own name; then he drew the papers there in my name, contracting with me. No sir, there was never any mention made of contracting with the Italian Plastering Company. I finished the work at that place; there were no complaints except as I have stated.

Cross-examination:

On cross-examination said witness further testified in substance that he is 30 years of age; Q. You are a lawyer also? Ans. I graduated in law last year also, yes sir; that prior to 1908 he had no experience in plastering having been a hotel waiter and steward; that in 1908 he took some contracts for plastering which were executed by others for him; that he knew what looked like good plastering; that common sense would tell that; that he knows about plastering from what common sense would tell him, and while he could not himself do the work of plastering, thinks himself sufficiently expert to pass on a job; "Think I am expert enough to judge of it myself;" that he got his knowledge through executing contracts for plastering aggregating in amount some \$10,000. And thereupon he was asked the following questions and gave the following answers:

30 Q. Who were the men who were associated with you as Italian Plastering Company? A. I didn't have any associations. I had some agents to do the work. One was Louis Lozupone and his father, and the other was Stephano Lozupone. Don't remember the names of the others. We were all working together; it was all a family of five, six or seven of them. I made arrangements with them to do my work at the Kalorama.

Q. What work did you do, you and the Italian Plastering Co? A. There wasn't any Italian Plastering Company. I didn't have any associations in the company. I had a bunch of men that contracted to do the work that I got contracts for, and the Italian Plastering Company was myself. I paid them wages. They agreed to do the work; no, I didn't pay them any of the profits. There was no stipulated salary at all until after we had seen whether there had been any gain or not, because they assured me that they would make some money for me. No stipulated payment to them until we had gotten along with the work.

Q. Until you had gotten through and found out how much had been made on the job? A. Yes sir; exactly. Then we would divide. I would give them some money, three or four dollars a day; or five dollars a day.

Q. And you all shared in that profit? A. No we didn't all share in the profit.

Q. If there was no profit, they did not get anything, did they?

31 A. Yes, they got something. Of course, they did. They got something like seven hundred dollars and I didn't get anything. So there is no share of profits there, is there? There was never any profits. "There isn't any Italian Plastering Company except myself." I am the Italian Plastering Co. I paid them as I could afford to pay them as they had agreed that they did not want any special salary, that they would wait, and they assured me tht they would make some money for me. I took them under that agreement and I saw they were not making any money for me, so I let up.

Thereupon witness was shown the following letter of proposal dated June 24, 1909 signed "Italian Plastering Co. E. J." which he admitted was written by him and which was offered in evidence:

The Italian Plastering Co.,
Fancy Mouldings & Cornice Work our Specialty.
2118 Pa. Ave.

JUNE 24th, 1909.

Mr. Leo Simmons, Kellog- Bldg., City.

DEAR SIR:—We beg to submit estimate for plastering & lathing your apartment house on Mintwood Place for \$1,850.00 and stucco work on the front and part of said walls as specified for \$300.00, will use spruce laths and best materials of other description, will warrant to give good satisfactory work.

Yours truly,

ITALIAN PLASTERING CO.
E. J.

32 By Mr. BIRNEY:

Q. These other people in the Italian Plastering Company—— A. (Witness interrupting.) That contract (referring to letter proposal of June 24) was not accepted. They were supposed to get a certain amount of money of whatever money was left. That is, they were supposed to get three or four dollars a day. The foreman was supposed to get five dollars a day, and the other men were supposed to get on an average of four dollars a day, but not until after we had made some money out of the work. That contract was not accepted, because that is for eighteen hundred and some dollars and the real contract was nineteen hundred dollars.

Q. You and Mr. Simmons talked it over and he agreed to give you fifty dollars more, did he not?

A. That was different work; that was more work added to it. He wanted a lot of moulding and it cost more. I mailed him that letter; cannot recollect the date. Have no memory on the subject. Saw him a week after that; the contract was entered into on the 30th. The stucco work was a separate contract which he made with me on the premises. I am positive about that.

Q. This — what it says, referring to proposal of June 24, “And stucco work on the front and part of side walls as specified, three hundred dollars.” Are you right or wrong? A. That is a side contract from the contract which he drew. There was nobody else in the Italian Plastering Company but myself.

33 Q. When you got through with this work, did you render account to these other men? A. I didn't have any accounts to render, except I told them there wasn't any profits, and I couldn't give them the regular salary which was stipulated for them, I gave them money according to how I collected it.

Q. And you did not pay them in full because you had not made any money out of it? A. Because he had not given me the money that was due on the contract; so I couldn't pay them for the full amount coming to them; they were supposed to get so much per day; made them a statement of what I had received and what I gave them. I don't know where the copy of it is.

Counsel for defendant called upon counsel for plaintiff to produce certain paper which the plaintiff had rendered to the men claiming to be his partners, and the following controversy took place.

Q. This is the account you rendered Mr. Lozupone, one of these men you named?

Mr. WHEATLEY: He could not have rendered that, Mr. Birney, it was in my possession.

A. I haven't given him any accounts rendered like this at the time. Yes, this is my handwriting. This is just to show how much money I have——

Q. Never mind what it shows, it shows on its face. You wrote this out to be rendered to Mr. Lozupone did you not? A. They wanted so much——

Q. Just answer my question. A. No, I didn't give that to be rendered.

34 Q. What did you write it up for? A. Just to give to Mr. Wheatley to show how I had the business contracted.

Q. Did you not give it to him in order that it might be shown to Mr. Lozupone, who was asking for a settlement? A. They sued me for so many days' work and I gave that statement there to Mr. Wheatley to defend those two suits which they sued me for so much they had done, so many days' work. I wrote it up myself and gave it to Mr. Wheatley.

Thereupon the following statement was offered in evidence.

Italian Plaster Co.
Fancy Mouldings and Cornice Work
Our Specialty.
2118 Pa. Ave. N. W.

WASHINGTON, D. C., Dec. 23, 1909.

Money to Collect.

Italian Plastering Co.

Leo Simmons.....	\$523.00	
Franzoni	14.00	
Donato Maraffo.....	100.57	
Luigi Lozupone.....	204.00	
Stefano Lozupone.....	430.72	
		1272.27

WASHINGTON, D. C., Dec. 23, 1909.

Money to be Paid Out.

The Italian Plastering Co.

Merchants & Mech. Bank.....	\$350.	
International Banking Corp.....	100.	
Columbia Grantie & Dredging Co.....	3.00	
Iacovazzi a Mechanic.....	2.70	
Jaselli & Lozupone.....	312.89	
		769.39

35

WASHINGTON, D. C., *Dec.* 23, 1909.

Donato Maraffo, Associate.

July 30.	Cash	1.00	
Aug. 14,	"	1.00	
" 17,	"	2.00	
" 21	"	5.00	
Sept. 4	"	10.00	
" 25,	"	2.00	
" "	"	10.00	
Nov. 1	"	39.57	
			70.57
" 20	"	30.00	30.00
			100.57

WASHINGTON, D. C., *Dec.* 23, 1909.

Mr. Luigi Lozupone, a Member of Co.

July 24,	Cash	20.00	
" 31,	"	23.19	
" 31,	"	87.00	
" " "	"	5.11	
" " "	"	.38	
Sept. 4,	"	15.00	
" 25,	"	15.00	
Oct. 9,	"	15.00	
" 15,	"	23.32	
			204.00

WASHINGTON, D. C., *Dec.* 23, 1909.

Mr. Stefano Lozupone, Foreman.

July 3,	Cash	261.29	
" 17,	"	20.00	
" " "	"	2.00	
" " "	"	3.00	
" 26,	"	1.00	
" 27,	"	1.00	
" 24,	"	10.00	
Aug. 7,	"	10.00	
July 31,	"	90.00	
" " "	"	10.00	
" 30,	"	1.00	
Sept. 18,	"	10.80	
" 25,	"	5.00	
Oct. 9,	"	10.00	
" 15,	"	50.85	
Sept. 1,		9.00	
			494.94

CR.

July 3, Extra Work.....	64.22
Amount received.....	<u>430.72</u>

36

WASHINGTON, D. C., Dec. 23, 1909.

Cash Credit

The Italian Plastering Co.

	Forwarded	6804.22
Sept. 30, Columbia Granite.....	115.30	
Oct. 9, pay roll.....	38.40	
“ “ machine repairs.....	7.75	
“ “ E. Jaselli Bros.....	38.28	
Sept. 30, W. A. Pierce.....	193.50	
“ “ National Mortar Co.....	157.05	
Oct. 13, Telephone service.....	4.25	
“ “ Edward T. Clark.....	5.00	
“ “ Thomas Webster.....	9.00	
“ “ E. Jaselli Bros.....	40.00	
“ 23, expenses	17.63	
“ “ discounted note.....	51.00	
Nov. 1, Barber & Ross.....	61.86	
“ 6, E. Jaselli Bros.....	20.00	
Oct. 23, Swarts & Law.....	48.00	
“ 30, pay roll.....	11.65	
“ 23, “ “	17.63	
Nov. 6, “ “	5.55	
“ “ Columbia Granit- Co.....	33.95	
“ “ National Mortar Co.....	62.38	
“ “ Rudolph West.....	5.52	
“ 8, Curtail note in bank.....	53.04	
“ 5, 1 Gal acid pail 7 brush.....	1.05	
“ 20, curtail note in B.....	26.85	
“ 25, National Mortar Co.....	76.38	
“ 27, B. B. Earnshaw.....	15.90	
“ “ Columbia Granite Co.....	1.10	
“ “ pay roll.....	18.25	
“ “ discount note.....	25.63	
“ “ Swarts & Lay.....	1.60	
Nov. 1, Jaselli & Lozupone.....	10.70	
Dec. 7, “ “	110.00	
“ 23, Tarantini	2.70	
Dec 23, Stefano Lozupone.....	430.72	
“ “ Luigi	204.00	
“ “ Donato Maraffo.....	100.57	
	<u>8826.17</u>	

37

Italian Plastering Co.
Fancy Mouldings and Cornice Work
Our Specialty.
2118 Pa. Ave. N. W.

WASHINGTON, D. C., Dec. 23, 1909.

Cash Credit

The Italian Plast. Co.

April 10,	Stefano Lozupone pay roll.....	400.
May 22,	" " " "	100.
" 29,	" " " "	90.
June 5,	" " " "	150.
" 12,	" " " "	145.
" 20,	" " " "	200.
" 26,	" " " "	300.
July 3,	" " " "	400.
" "	E. Jaselli expenses.....	25.
" 6,	W. A. Pierce.....	582.25
" 7,	purchase of wagon.....	18.00
" 9,	Wash. Post adv.....	6.00
" 10,	pay roll.....	320.25
" 15,	" " lather Roland.....	19.00
" 17,	repairs for wagon.....	16.00
" "	National Mortar Co.....	218.25
" "	Rudolph West.....	96.05
" "	pay roll.....	210.90
" 24,	Downs lather.....	45.15
" 19,	laborer	7.20
" 24,	Downs for nails.....	.25
" "	pay roll.....	159.00
" "	E. Jaselli Bros.....	361.77
" 28,	Daniels laborer.....	6.00
" 29,	Davis	1.50
" 29,	Frontal to.....	1.00
" 30,	lather's pay roll.....	37.66
" "	pay roll plasters.....	125.
" "	E. Jaselli Bros.....	10.52
Aug. 6,	lamps & old lumber.....	3.75
" 7,	pay roll.....	132.90
" "	Fernehoug horse rent.....	12.00
" "	Jaselli Bros.....	5.80
" "	lathers pay roll.....	65.77
" "	Thomas Webster.....	5.50
" "	Wash. Harness Co.....	1.75
" "	Bill head 10, laborer 15.....	.25
" 14,	pay roll lathers.....	57.11
" "	pay roll.....	85.80
" 19,	E. Jaselli & Bros.....	120.00
" 21,	Lather's pay roll.....	53.69
" "	pay roll.....	124.15

 4719.92

WASHINGTON, D. C., Dec. 23, 1909.

Cash Debtor

Italian Plast. Co.

July	6,	Merchant Bank	500.
"	3,	Bates Warren	600.
"	26,	"	300.
"	19,	J. D. Burns	150.
May	10,	Etchison & Simmons	400.
"	22,	"	100.
June	5,	"	160.
May	29,	"	100.
June	19,	"	200.
July	7,	J. D. Burns	100.
"	10,	"	100.
"	"	Bates Warren	100.
"	"	E. Jaselli Bros	25.
"	"	"	136.68
"	17,	J. D. Burns	150.
"	"	Bates Warren	350.
"	"	E. Jaselli Bros	20.
"	19,	"	10.85
"	24,	Prescot Winfield	600.00
"	30,	"	200.00
"	23,	E. Jaselli & Bros	125.00
"	31,	Bates Warren	150.00
Aug.	6,	Gilman's Drug Store	125.
"	"	R. C. Daniels	325.
"	12,	E. Jaselli Bros	40.
"	19,	A. Schneider	300.
"	19,	R. C. Daniels	25.00
"	16,	International B. Corp	300.
Sept.	4,	Leo Simmons	600.
"	4,	Prescot Winfield	200.
"	4,	E. Jaselli Bros	46.50
"	"	Franzone	35.00
"	10,	Prescot Winfield	100.
"	10,	Simmons	200.
"	14,	Pickford	45.
"	18,	Bates Warren	146.50
"	4,	Schneider	100.
"	25,	Simmons	200.
"	25,	Mr. Wood	75.00
Oct.	1,	Simmons	300.
"	4,	Etchison & Simmons	45.00
			7785.53

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WASHINGTON, D. C., Dec. 23, 1909.

Cash

Credit

The Italian Plastering Co.

	Forwarded	4719.92
Aug. 21,	1 Lamp & horse feed.....	.90
" "	Gaston laborer	1.80
" "	premontese	2.00
" "	Tarantini	.90
Aug. 7,	Swart & Lay.....	80.10
" 11,	Rudolph West	7.93
June 2,	Bush Plumbing Co.....	4.00
July 10,	Columbia Granite Co.....	136.68
" 2,	Wm. H. Dyer.....	1.80
June 28,	Hugh Riely	2.50
Aug. 23,	National Mortar Co.....	178.05
" "	Columbia Granite Co.....	194.19
" 24,	Downs lather	1.00
" 28,	pay roll	249.16
" "	Downs extra work.....	5.00
Sept. 1,	Wm. Jaselli	7.20
" "	Herbert & Fowler.....	8.00
" 4,	Peirce	207.26
" "	Fernehough	13.50
" "	pay roll	195.86
" "	expenses	11.10
" 11,	pay roll	130.65
" 18,	" "	149.95
" "	Warren refunded	1.00
Sept. 6,	Merchants & Mech. Bank Dis.....	105.00
" 11,	Barber & Ross.....	73.00
" 14,	International Bank. Corp.....	101.50
" 23,	Peremontes Laborer	1.00
" "	White sand	.30
" "	Wash. harness Trunk Co.....	2.75
" "	Avollone mechanic	17.00
" 25,	Downs lather	13.97
" "	part of pay roll.....	81.40
" "	Baldasare	20.00
" "	B. B. Earnshaw.....	15.90
" "	E. Jaselli Bros.....	14.70
Oct. 4,	pay roll	31.60
" "	coal oil	.25
" "	E. Jaselli & Bros.....	10.80
" 9,	Downs lather	4.60
		6804.22

The Italian Plastering Co.
Fancy Mouldings and Cornice Work Our Specialty
2118 Pa. Ave. N. W.

WASHINGTON, D. C., Dec. 23, 1909.

Cash

Debtor

Italian Plastering Co.

Forwarded		7785.53
Oct. 9	Simmons	125.
" 13,	Preston Winfield	75.00
" " "	Mr. H. S. Wood	58.20
" 23,	Schneider	50.
Nov. 1,	Preston Winfield	100.
" 2,	J. D. Burns	20.
" " "	E. Jaselli & Bros	80.
Sept. 15,	E. Jaselli & Bros	25.75
July 3,	Stefano Lozupone	64.22
Dec. 11,	Jaselli & Lozupone	433.59
		8817.29

Have no recollection sending papers like this to each of other men, unless it was to show them how much money I gave them; have no recollection of sending the paper. I told them I could not give them any more money until I had collected the money from Mr. Simmons, and they sued me for so many days' work.

Counsel for defendant then read the statement referred to, dated December 23, 1909, showing an account between plaintiff and the other parties claiming to be partners, whereupon witness testified, that the account "was simply kept to keep it separate from the business I had." That was to keep my business separate from the Jaselli Bros. business. "I am the Jaselli Bros."

Q. What do you mean by calling Mr. Luigi Lozupone a member of the company? A. That is, a member of the company of the men that were supposed to do my work.

He was included with the 4 or 5 that contracted with me to do whatever work I could get contracts for. I was trading as the Italian Plastering Company; I can conduct several businesses. I was trading under E. Jaselli Bros. I am running a business now, Emilio Jaselli, trading as Jaselli Bros. and I can just as well conduct an Italian Plastering Company.

Q. When you called Mr. Maraffo a member of the company, it would indicate he was a partner of yours, but you did not mean it? No. Answer. A. I started to begin this work right after signing the contract. Forget when I finished it, but within 30 days I had the solid plastering all done, with the exception of trimmings and some of the mouldings, which was to be put on certain designated rooms. Sometimes I had ten, sometimes I had fifteen, sometimes twenty men according to how fast I could proceed. Stephano Lozupone was my foreman. I stopped work there somewhere in September. The pointing up was in November. He wrote me a letter on the 5th of

October, that he wanted me to do the pointing up; I was all through long before that, because the painter was through then. There were tenants in the house before it was completed; before there was a door in the entrance. I know Mr. Demonet a tenant there; he moved in before I plastered the basement. Know the work was finished with the exception of a few mouldings put around the room. Don't recol-

lect that was done. Got through the solid plastering some
42 time in September; about the beginning of October. I was a

little delayed in the mouldings on account of being rushed with the plastering. Had to take the foreman off the plastering to make the mouldings, which took some time. They were finished, however, before I got that letter. Think all the mouldings were up except one room. There was one room left that we had to do the moulding ourselves; the foreman had to do that, and I rushed him up to do the plastering. Defendant was supposed to furnish me with the laths. One of the bills shows I got laths on September 29th. My contract called for the lime and hair to be furnished by Knott & Moler, but I told him I would get them from the National Mortar Company. I ordered it from the National Mortar Company and he knew all the time I was getting it from them. I don't remember whether it was 60 or 70 cents a barrel or bushel. Anyway I got first class stuff. I say there are different prices of lime. There is lime you can buy for 60, 70, 80 or 90 cents or a dollar; and each lime furnished has a different quality. I called Mr. Simmons' attention to this. I did not engage any of the plasterers. I know what sand finish is. The contract calls for public halls and bathrooms to be finished in sand finish. Yes indeed, I finished them in sand finish. I had it done with sharp river sand over the second coat; what is known as a rough finish instead of a smooth, lime finish. A sand finish is what is known as rough finish, where paint is supposed to be put on, or left without paint. Put on two coats; I certainly do
43 think it was a good job. He didn't complain of it until after the painter had painted it. He complained about the kitchens before. He said they were not satisfactory. I said I wouldn't charge him for them and he was satisfied. I wouldn't want to say what has been put in the pastering, because as I say I am not an expert at the doing of the work; I was just simply following out the instructions of the contract and leaving that to my foreman. Hair, lime and cement was used.

Redirect examination:

Q. Your contract called for lime and hair to be furnished by Knott & Moler? A. Yes. I called Mr. Simmons' attention to that, and I told him I didn't have no account with Knott & Moler; that I had an account with the National Mortar Company. I asked him if he wanted to furnish it or order it; he said he wasn't going to do it that I had to order it. I ordered it from the National Mortar Company and he knew all the time that I was getting it from the National Mortar Company.

Q. You paid considerably less a barrel for your lime did you not?
A. No, not that I remember, don't remember whether it was sixty

or seventy cents a barrel or bushel or whatever it is, anyway I got first class stuff.

Thereupon the plaintiff called as a witness in his behalf one JONES, who testified in substance as follows: that he was a lather and did the lathing on the apartment house referred to in the contract. That the work was not ready when they first went there, and he
44 thought they had to wait about 3 weeks before they could begin to get it ready. That at the time they began the work, the floors were laid on the first floor but on the upper floors they had to walk across metal lathing, and it was very troublesome. He knew nothing about the plastering except he helped put the laths on.

Thereupon the plaintiff called as a witness, JAMES NOLAN, who testified in substance as follows: that he had been a journeyman plasterer, (not a contractor) for about 30 years. He said he had examined the plastering in the main public halls of the apartment house on Mintwood Place, known as the "Knickerbocker" and found it was a kind of sand finish and a fairly good job according to that class of work. He said the last coat was lime and sand; he could not tell if it was sand finish because it was painted.

Thereupon JOHN HUGHES was called and testified in substance as follows: he was a journeyman plasterer, that he went to the building, saw the plastering in the main halls about January 27th, or 28th, did not go higher than the first floor; that it was a fairly good job of work.

Thereupon JOHN LYNCH was called as a witness in behalf of the plaintiff and testified in substance that he had been a journeyman plasterer for 9 years; that he had examined the plastering in the halls of the building referred to and that it was a fairly good job of work for laid on work; a good, first class job for that kind of work. He could not tell how it was finished on the side walls; but
45 could tell from the ceiling; went upstairs as far as the second floor; could not tell whether it was sand finish or not because it was painted, other than the condition of the ceiling.

Thereupon plaintiff called as witness, E. M. Vasco who testified in substance as follows: that he was a plasterer and had been one for about 4 years; that he saw the work 2 or 3 days after it "got done." It was in the summer time about a year ago; said there was one sand coat on the bath rooms; all good work according to that kind.

Thereupon plaintiff called one Wm. Cross who testified in substance that he was a lather and went to work on the building for Mr. Jones as a lather about the middle of August; worked on the job about a month. No floor in the building excepting on the first floor; metal lathing and cement put in on the floors while there.

Thereupon plaintiff called as a witness, one I. CHESTON a salesman for the National Mortar Co., who testified in substance that he sold the white sand that was used on the building for the outside work and sold the lime and hair to Mr. Jaselli for plastering; that his lime was just as good as Knott & Moler's; that Knott & Moler sold their lime for ten cents more per barrel than they did, but he did not know how they managed to do it; sometimes Knott & Moler bought lime from his Company.

Thereupon the plaintiff called as a witness one ROY REEVES who testified in substance, that he was the agent of the Columbia Granite & Dredging Company, that he sold the sand to the plaintiff for the work on the building and sent the sand to the place in
46 August, 1909. Some of the sand was used for the stucco work outside.

Thereupon the plaintiff called as a witness one CHARLES DEMONET who testified in substance that he was a tenant in the building and moved in there about the 7th or 8th of November 1909; that the carpentering work was not finished and the plastering was not finished in the halls. That he called up the plaintiff Jaselli, whom he knew very well, and asked him to hurry up the plastering; that the mouldings in some of the rooms was not finished when he moved in.

Thereupon the plaintiff called as a witness one E. M. VAN NESS who testified in substance that he was a contractor and builder. That he had been working for himself for about 10 years and had built a great many houses. That a few days prior to testifying, he and plaintiff, Jaselli, met Mr. Simmons at the building in question at about 4:30 o'clock in the afternoon; that Mr. Simmons told them they could not go into the rooms at that time as the tenants would object to it. That he examined the plastering in the halls and would say that it was an average good job; that it was sand finish on the ceilings; but he could not tell how the walls were finished as they were painted; but it looked to him like a first class job of work, although it was very rough; he thought the roughness was caused by painting.

Thereupon the plaintiff rested his case, and offered no other or further evidence.

And thereupon the defendant, through his attorney, moved the Court to direct the jury to find a verdict for the defendant upon the ground that it is clearly apparent that the contract for the execution of the work was not made with the plaintiff, but was made
47 with the Italian Plastering Company, composed of Stephano Lozupone, Denato Maraffo, Louis or Luigi Lozupone and the plaintiff; that it clearly appeared also that the work was performed by the parties named, under the partnership name of the Italian Plastering Company, and that if anything at all was due it was due to the Italian Plastering Company. That the words Jaselli Bros. in the body of the contract, only indicates that if the contract was prepared under an erroneous impression and if it had been signed

absolutely by Jaselli Brothers and not by Jaselli for the Italian Plastering Company, it would make no difference and if anything was due at all on account of the work, it was due to the members of the Italian Plastering Company, and therefore, the plaintiff could not recover. But the court overruled the motion and the defendant excepted.

And thereupon the defendant moved the court upon further grounds to instruct the jury that the plaintiff could not recover on the first count of the declaration, and the Bill of Particulars relating thereto (Exhibit A) for the reason that it clearly appeared that the contract for the work was made with the aforesaid parties composing the Italian Plastering Company, and if anything is due upon same, it is due to the said Italian Plastering Company.

And the defendant further moved the court to instruct the jury that the plaintiff could not recover, inasmuch as he had sued on the common counts for a quantum meruit and not under the contract, and had made no proof whatever of the value of the work
48 performed. The Court overruled each and all of said motions and the defendant excepted to each refusal.

And thereupon the defendant testified in his own behalf that he had prepared both of the papers put in evidence as the contracts between the parties; that the plaintiff and the other members of the Italian Plastering Company above mentioned, had plastered a building who Howard Etchison, a young man whom the defendant raised and in whose welfare he was interested was building; that at the time he prepared the papers offered as contracts, and before talking with the plaintiff about the matter, he supposed that the parties composing the Italian Plastering Company, namely Stephano Lozupone, Louis or Luigi Lozupone, and Denato Maraffo, not knowing their names, were the brothers of the said plaintiff, Emilio Jaselli; that he did not know that the said plaintiff was conducting any other business than that of plasterer, and, therefore, prepared said papers under the impresssion that the Jaselli Brothers composed the Italian Plastering Company, but when said Jaselli was ready to sign the papers, he informed the defendant that such was not the fact, that the Italian Plastering Company was composed of the said parties, namely, the two Lozupones, himself and Maraffo, and that all the correspondence in relation to said work which he received from said plaintiff, was conducted in the name of the Italian Plastering Company. That said plaintiff said to him distinctly at the time of signing the contract, that Jaselli Brothers were carrying on a wine and liquor business and said firm had nothing to do with the Italian Plastering Company, except in so far as he
49 was a member of said firm.

That the paper produced by him defendant on the examination of the plaintiff and put in evidence, was signed by him and then by Jaselli for the Italian Plastering Company; that the paper offered in evidence by the plaintiff was signed by him, the defendant, on the day which the paper bears date, and turned over to the plaintiff Jaselli as a copy or memorandum of the agreement as to conditions, etc., and not as to parties, supposing it would be signed,

if at all, like the one left with him; that he did not think it material that the name "Italian Plastering Company" was not in the body of the contract, and did not change it before signing. The defendant further testified that the work performed under the contract had not been done satisfactory to him and had not been done in a workman-like manner.

That the main corridors of the building were left in an unfinished condition, only having a coat of brown mortar and not finished in a sand finish or white finish; that the plastering was left only in a brown finish, as aforesaid, and so rough that it would have been unfit to have in a small shanty of a building. That the 15 bathrooms were to be also sand finished as shown by contract, and they were left in a similar condition, unsightly and rough. That the defendant had offered to pay the plaintiff at the rate of \$1.50 each, difference between the finish of white coat, which was to be placed on the kitchen and sand finishing same, and thus the white coat or hard white finish of same was abandoned. That the plaintiff neither
50 white coated or sand finished the kitchens, but left them in a rough unfinished condition similar to the bathrooms and main corridors, and thereby saved the cost of white coating said kitchens; that the kitchens, corridors and bath rooms were all left in a rough unfinished condition, such condition being similar to a house being roughed in, with brown mortar and ready to be sand finished or to receive hard white finish. That the whole of the work was poorly done and that the ceilings in one room had fallen off since the work was done; that many of the dining room ceilings were cracked and witness believed that many of them would fall or have to be taken down.

Witness, the plaintiff, then produced and offered in evidence the following check, the first payment under the contract:

WASHINGTON, D. C., *Sept. 4th.*

Pay to the order of E. Jaselli Bros. \$600.00.
(For Italian Plastering Co.)

and endorsed on the back "E. Jaselli Bros." in the handwriting of the plaintiff, and further testified that the four other checks given plaintiff were drawn to the order of E. Jasselli Bros., because knowing him to be a member of the firm, the defendant did not take the time to write out the full firm name.

That he had time and time again objected to the plaintiff and to Stephano Lozupone as to way the work was being done, especially in said halls and bathrooms, and that he tried his best to get them to sand finish the bathrooms and halls according to contract,
51 but they refused to do so. That at the time the plaintiff offered to tear off the rough mortar from the walls and do the work over in the corridors, the house was all rented and partly occupied and that he could not permit him to do so as the damage would be too great, possibly loss of all his tenants and prevent others he had secured, from coming in.

That after the plaintiff refused to correct the poor workmanship

by using other means, that he, the defendant then engaged painters and put on what they call a rough paint finish, consisting of heavy paint materials in order to cover up the roughness of the walls in the corridors of the building and place them in a partially passable condition.

The defendant offered in evidence the following letter of October 5th, 1909, and testified that the same was sent the plaintiff by him:

OCTOBER 5, 1909.

E. Jaselli, Esq., 2118 Pa. Ave. N. W., City.

DEAR SIR: I wish you would send a man to the Mintwood Place apartment house at once to do some pointing up which is necessary in order that the trimming can be put on the doors and windows.

This could ordinarily wait until the trimming is done, but the plastering which you have done there is in such a rotten condition, it falls down in nailing up the door jambs, and in many places it will be impossible to point it up properly after the trimming is nailed up. It will be well for you to put some plaster of
52 paris or cement in the mortar, in order that it will set up quick, and not delay the man in putting on the trim.

I was at the building today and did not find any of your men there at all, and unless the work is attended to more properly, I shall exercise the right to charge you \$10. a day forfeit, as provided in your contract, even if the work is accepted by me when you are through with same.

Yours very truly,

LEO SIMMONS.

That he had paid for doing said paint work on the side walls of the halls alone, over and above what it would have cost him if the walls had been properly sand finished according to the contract, the sum of \$153.

That he had to use in the bathrooms and kitchens owing to the neglect of plaintiff to properly do the work, 3,800 pounds of lead and about 100 gallons of linseed oil to cover up the defects in the workmanship. That the cost of correcting the work on the ceiling of the main corridors, and all of the 15 bathrooms and kitchens, owing to the neglect of the plaintiff to finish same according to his contract would amount to \$444, in addition to what had already been expended \$153, on the side walls of the corridors.

That the things necessary to make the work in the corridors, bath rooms and kitchens in accordance with the contract would cost much more than the plaintiff's claim.

Defendant further testified that he had not authorized
53 the plaintiff to change the grade of lime and hair called for by the contract; and did not refuse to order same; did not know it had not been provided as contracted until the rough mortar was on the walls sometime in October; that he has had considerably building done in improving his own property and always required Knott & Moler's lime, which cost ten cents more per barrel than other lime.

That the contract for doing the outside work in accordance with the proposal, dated June 24, of \$300. was not given to the Italian Plastering Company at the time the other contract was signed; a few days later he informed the plaintiff that he would accept the written bid for same and that they might proceed with the work at the price bid \$300. That he paid in all including the materials furnished the sum of \$1,666.; that he paid for the work on the exterior of the building, the full amount of the contract price, to wit, \$300. on the 30th of September, 1909, with the following check dated Sept. 30, 1909, which was then offered in evidence.

WASHINGTON, D. C., *Sept.* 30, 1909.

Pay to the order of E. Jaselli \$300.00 (Three Hundred Dollars).
LEO SIMMONS.

and which was endorsed by "E. Jaselli. The Italian Plastering Co. E. Jaselli," such endorsement being in the handwriting of the plaintiff.

The following checks were also read to the jury, at request of Plaintiff:

54

No. 4289.

WASHINGTON, D. C., *Sept.* 11, 1909.

Pay to the order of E. Jaselli Two Hundred Dollars (\$200).
LEO SIMMONS.

and endorsed E. Jaselli.

No. 4326.

WASHINGTON, D. C., *Sept.* 25, 1909.

Pay to the order of E. Jaselli Two Hundred Dollars (\$200).
LEO SIMMONS.

and endorsed E. Jaselli.

No. 4377.

WASHINGTON, D. C., *Oct.* 9, 1909.

Pay to the order of E. Jaselli One Hundred and Twenty Five Dollars.

and endorsed E. Jaselli & Bros.

LEO SIMMONS.

That the work was not finished according to the contract and not within the time specified by the contract; that the building was all ready for the work of the Italian Plastering Company, when the contract was signed; and that it did begin same on or about the 1st of August, 1909; that said work of plastering was not finished until after the 1st of December, of that year; that instead of taking thirty days as required by the contract, they had been more than four months; that the delay in the plaster-

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ing had caused him a great loss; that the building was most all rented under agreement to permit the tenants to occupy apartments from the 1st of October; that none of them were able to get in until after the 7th of November, and others much later than that.

The defendant further testified that he had met Jaselli, the plaintiff, and Van Ness, a witness, at the building a short time before about 4:30 o'clock in the afternoon of January 28th, and stated that he could not permit them to examine the kitchens and bath rooms at that hour of day, but for Jaselli or his counsel, Mr. Wheatley, to appoint some earlier hour on another day and he would be glad to allow them to inspect the work.

On cross examination said witness said that he had employed Stephano Lozupone to do other work since this work was done; that he had paid the plaintiff on October 9, 1909, after writing the letter of October 5th, the sum of \$125 on account of the contract; that he paid the said amount on the promise of said Jaselli that he would make everything all right and do the work in a first class manner and hurry it through.

On being asked why he did not object to the plastering of the walls in the corridors before the paint was put on, the witness answered that he did, and had done everything he could to
56 get the plaintiff and other members of the Italian Plastering Company, to correct same and they refused and there was no other alternative but to cover it with paint as he did.

And thereupon the defendant called as a witness STEPHANO LOZUPONE who testified in substance that he was one of the members of the firm of the Italian Plastering Company; that the said Italian Plastering Company consisted of Emilio Jaselli, Stephano Lozupone, Louis Lozupone and Donato Maraffo. That he told Jaselli to form the Italian Plastering Company, and it was arranged that each one of the four members including Jaselli, was to have \$4 a day; that he as foreman was to have \$5 a day. That Jaselli was to secure work and sign the contracts; "He going to sign contract; he going to take all jobs; he was to keep some account with me and keep account; he took all the money; he pay for the material, and I pay for the plastering. He keep all the business and took out the association and never give an account. I told Mr. Jaselli to make up company and he made up the company for me because he did not understand the plastering. I don't remember how much Jaselli took out, I have some books home. He never paid me; never paid Danoto and never paid my father."

Thereupon the witness not understanding English very well, one Frank S. Paladini was called as interpreter, and thereupon through the interpreter, said witness in substance testified as follows:

That he received one dollar a day extra. That the arrangement while working on Mr. Simmons' house and other houses was
57 the same. Says on Mr. Simmons' job the account that was given by Jaselli was copied from such account in Mr. Wheatley's office. Says Jaselli gave him money to pay off the men who were working on the job, and then sometimes there was some extra

money and the extra was given either to his father or the other partner Mr. Maraffo; that Mr. Jaselli never paid his father or Maraffo any stipulated sum.

Question by Mr. BIRNEY: "What part of the profits was your father to have?" A. He was to have his share like the rest of the partners and same with Mr. Maraffo.

Says there was a profit on the former building, known as the Kalorama, but Mr. Jaselli did not divide that, he retained that in order to have some funds in the company, that is what he said.

And on being asked the question, "what was the agreement between you and the other members as to the division of any part of money that should come out of any job?" the witness answered:

A. "If they got a job and there was a profit it was to be divided equally among the four, but he (the witness), got one dollar a day extra, and that was the arrangement under which the work was done on Mr. Simmons' house."

On cross-examination witness said The Italian Plastering Company started out with an agreement between Jaselli, Danoto Maraffo, Louis Lozupone and himself, that Jaselli, Maraffo and his father were to take \$4 a day, each and he was to take \$5 a day, if there
58 was sufficient profit in the business to pay that. That the agreement was made this way, Emilio Jaselli was to get \$4 a day, Mr. Maraffo \$4 a day, Mr. Louis Lozupone his father was to receive \$4 and witness was to get \$5 a day. That he did not know that Mr. Jaselli in order to carry on the financial business had to go to some banks and borrow money, if he did, it was his own personal affair, and did not know anything about it; says he was brought to bank once and made to sign some papers but he did not know what they were. He did not know what they were, but he knows he signed the paper; that he had nothing to do with the handling of the check for the Italian Plastering Company; did not make any. He made the estimates for all the work and Jaselli signed the contracts.

Q. Did you know anything about the signing of any contract by Mr. Jaselli for himself, or for The Italian Plastering Company? A. (Through the interpreter:) He says all he knows was that he was in the partnership and does not know how these contracts were signed by Mr. Jaselli. Says he was not at the office at the time Louis Lozupone and Denato Maraffo signed a paper to bring suit against Jaselli; he was not present. Says the contract in relation to the partnership was verbal, that after Simmons' work was completed Maraffo dropped out of the partnership, that he does not know anything about the suit brought by his father and Maraffo against Jaselli. After the Simmons work was completed they did some work
59 for Mr. Pickford and that he did some work for Mr. Simmons on Wyoming Ave., does not know how long the job lasted probably about two months.

And thereupon the defendant called as a witness, FRANK S. PALADINI who testified in substance that he was a member of the bar of the Supreme Court of the District of Columbia.

That sometime in the month of December, 1910, Denato Maraffo,

and Luigi Lozupone called on him, stating they had a claim against the plaintiff, Jaselli; that at the time he did not know that they were partners, or claimed to be partners of said Jaselli in the plastering business, and being Italians, not familiar with the laws of the District, did not know enough to explain their relations with him; and on learning the number of days they claimed to have been at work he filed suits for them in the Municipal Court against Jaselli for the amounts in accordance with the claims they made based on their daily employment; that after he had filed the suits the plaintiff, Jaselli, had them removed by certiorari to the Supreme Court of the District of Columbia and in the affidavit stated he had an absolute defense to them; that thereafter on learning of the partnership between Jaselli, Maraffo and the two Lozupones, he called upon Mr. Jaselli for a statement in relation thereto, and was shown the statement of account heretofore offered in evidence; that after examining the statement in Mr. Wheatley's office and being informed by Jaselli that the partnership existed, he proceeded no further with the suits, supposing that Mr. Jaselli had an absolute defense to same on account of the partnership.

60 On cross-examination said witness testified in substance that he had talked with Mr. Wheatley and Jaselli about the claim of the parties whom he represented and that Mr. Jaselli stated he would furnish him with a statement of the account between Jaselli and the other parties showing the disposition of the money that had come into his hands. That he did not proceed with the suits for the reason that he was informed and decided that there was a partnership and that the two parties being partners could not maintain their action on that account and that said suits had not been dismissed, as he took no further action on them. That he made a copy of the statement offered in evidence which he saw in the office of Mr. Wheatley, the attorney for the plaintiff.

Thereupon the defendant called as a witness one JOHN SIMMONS, who testified in substance that he was no relation to the defendant in the case and had been in the plastering business for 25 years, both as a contractor and as a journeyman plasterer; that he had a great deal of work and had under him at times a great many men.

That he had examined the work of plastering in the building known as the "Knickerbocker," 1820 Mintwood Place, that is, so far as it applied to the halls, kitchens and bath rooms of said apartment house. That said building had apparently 15 apartments, and consequently 15 baths and kitchens; that he examined especially the main corridors. That he saw the vestibule of the building which is about 4 stories high, shortly after the plaster was put on, and examined the work more fully a few days ago; that the kitchens, bath rooms and halls were all the same character of work, that is, that the work was never finished, simply having two coats of brown
61 mortar on them, and left in a rough state ready for white coating or sand finishing. That at the time he examined the vestibule, it was in the same condition then that it is now, except that it has been painted over.

That a white coat finish is made with lime slacked into a putty substance and mixed with plaster of Paris, then it is put on the walls and troweled to a hard smooth finish; that the sand finish is made with lime slacked into a putty kind of paste and mixed with white sand and put on a trowel and then leveled up with what they call a floating instrument in the shape of a trowel. The difference between the white coat and sand finish is that the white coat is a white hard smooth finish while the sand finish is straight and level, but is not smooth owing to the grains of sand put in it. This sand finish work is done often in corridors and bath rooms in order to avoid papering and so that it can be easily painted with a kalsomine finish or water color.

That the work as it was left was in an unfinished condition and a very poor finish at that; that he supposed the work could be made a good job if it had been sand finished, but it was neither sand finish or white coat and that the cost of either sand finish or white coat would amount to about one-third the whole cost of plastering.

Thereupon the defendant called as a witness GEORGE E. BARBER, who testified in substance that he had been in the plastering business 30 years as a contractor and is a practical plasterer by trade; that he had carried on a large and extensive business in plastering and at that time had nearly 100 men employed in doing such work. That a few days ago he examined the plastering in

62 the building known as the "Knickerbocker," 1820 Mintwood Place, in all the rooms of the entire building except the cellar; that he found the plastering in many of the dining rooms ceilings cracked and it looked to him as if many of them would have to be taken down; that the kitchens, bath rooms and public corridors were left in an unfinished condition, having only two coats of brown mortar on same; that the rooms and corridors referred to were at the time the plastering was stopped on same, ready to receive what is known as white coat which is finished in a hard white finish in plaster of paris and lime; or sand finish which is composed of lime slacked into a soft putty plaster and sand; that the walls and ceilings in said corridors, bath rooms and kitchens had not received any coat of white coating or sand finish; that he considered the plastering in said kitchens, bath rooms and corridors in an unfinished condition. That the white coating or the sand finishing as the case might be, was from one-third to one-fourth the cost of the plastering; that there was little difference between the cost of sand finishing and white coating, a small difference, probably in favor of the sand finish, as it took longer to put that on. That as he looked at the work, the job was not finished and was in very poor condition, even for white coating or sand finishing; to his knowledge he never saw a residential building left in that condition, it neither being white coated or sand finished.

And thereupon the plaintiff called JOHN J. EARLY, who testified in substance that he was carrying on the plastering business, and had been for 7 or 8 years; that he carried on an extensive
63 business and at the present time had from 50 to 75 men employed; that the character of work he did was in high classes of buildings; that a few days ago he examined the plastering of the corridors and four of the kitchens and bath rooms, but did not see the dining rooms of the apartment house at 1820 Mintwood Place, known as the "Knickerbocker;" that the kitchens and bath rooms he examined and the main corridors, walls and ceilings, were in the same condition as to the plastering. That the work appeared to have only 2 coats of brown mortar, possibly one coat of what is known as "laid on work." That "laid on" plastering was as good as what was called "three coat work," excepting it took less time to put it on and was a saving in scaffolding. In other words instead of putting on a rough coat and then a second coat and a white coat or sand finish at different times and with different scaffolds, the roughing on coat and second coat were put on from the same scaffold and at the same time; that it made as good plastering as putting on the coats at different times excepting it took longer to dry. That the work he examined, namely, four of the kitchens, bath rooms and main corridors did not have more than two coats of brown mortar on same, and was neither sand finish or white coated. That there were several cracks in the walls, some of them very bad cracks, but he could not say it was caused by the plastering; it might have been shrinking of wood. That the work was not finished in a sand finish or in a white coat, and that the character of work he would say was very poor. That the cost of the sand finish and the white coating was about the same, and
64 that a building left without sand finish or white coat would be in an unfinished condition.

Thereupon the defendant called FRANK BEALL, who testified in substance that he did the painting on the plastered walls in the corridors, kitchens and bath rooms of the "Knickerbocker." That the work was left with the brown plastering on and it was in such a rough condition that it was impossible to finish it with ordinary paint. That he was surprised when he heard the plaintiff say that the work was finished; that he was ordered by the defendant to proceed and try to cover up the defects with paint, and after getting two coats on the main corridors, he found it was impossible to do so. That he then, at the direction of defendant, made up what is known as a rough caste or stucco finish of white lead, oil and whitening, so that it could be put on with a brush and "pounced" with what is known as a pouncing brush to even up the defects in same. That without having this work done in that way it would have been in such a rough, bad condition, it would have been a very great detriment to the character of the apartment house. That he used on the kitchens and bath rooms alone about 3,800 pounds of white lead, and about 60 gallons of oil and other paint mixtures to try to cover up the defects, but after it was all done, it was still in a

rough, bad condition; that he never saw in his whole experience such plastering; that he had been painting over all kinds of walls in the last 30 years, and had never seen anything to equal the poor character of work; that the defendant had paid him \$75.00 for doing the work made necessary by reason of the work not being sand finished on the corridors, and it had cost as much at
65 least, to purchase the material to do same. That the white lead and oil he used in the building cost for the lead at the rate of eight cents per pound and oil at seventy cents per gallon; that if the said work had been properly sand finished, it could have been finished in what was known as water color or alabastine, which would not have cost one-sixth the cost of the paint and made a much better appearing job. That he had heard the defendant in the case complain to the plaintiff time and time again of the bad condition of the walls and ask him to correct same; but he had declined to do so as far as he knew. Said witness further testified that said plaintiff had informed him that Stefano Lozupone was his partner, and had heard him speak to other parties as being in partnership in doing the work.

Thereupon the defendant called one EDWARD McGEE, who testified in substance that he was a carpenter and joiner by trade; that he was employed by the defendant to superintend the carpenters' work on the building known as the "Knickerbocker" in the summer time and fall of 1909. That the building was ready for plastering on the 1st day of August excepting a small amount of work necessary to be done on the fourth floor; that it only took a day or two to get that finished. That there was nothing whatever to stop the plasterers from beginning on the 1st of August, and they did begin that day. That the plastering on the building was not finished until long after the tenants moved in. Mr. Demonet moved in, and at that time they were not through plastering the corridors;
66 that he heard the defendant complain to the plaintiff about the way the plastering was done in the kitchens, bath rooms and corridors and heard him say it was not a sand finish, and asked the plaintiff to try and help him do something with it to put it in condition so that it would be a passable job for residential purposes. That the said plaintiff had introduced him to Stephano Lozupone as one of his partners in the plastering business, and that he had heard him speak to others of Lozupone as being one of his partners.

Thereupon the defendant called as a witness, HOWARD M. ETCHISON, who testified in substance that he was the party referred to as having built the Kalorama Apartment house, 1816 Kalorama Road. That he and defendant's son, Berkeley L. Simmons had built that place and had contracted with the plaintiff in this case to do the plastering in the spring of 1909. That plaintiff came to see him to secure the work of plastering the building and said that he was trying to get some work for a lot of his Italian friends and "brothers" as he called them. He made the proposition to do the work and

nothing was said about sand finishing in that contract. That he, the plaintiff, said to the witness that he had a Company known as the Italian Plastering Company and after consideration witness said he would rather make the contract with the plaintiff because he had a grocery and liquor business and he did not know anything about the other Italians. That his work was done fairly well, having many American workmen among the employed, but he did not have all the same men working on the defendant's job. That the plaintiff told him his firm was the Italian Plastering Company and consisted of Luigi or Louis Lozupone, Stephano Lozupone, Denato Maraffo and himself.

And thereupon the plaintiff testified in his own behalf in rebuttal in substance, that he did not tell the defendant that the Italian Plastering Company was composed of the four men, Denato Maraffo, Luigi Lozupone, Stephano Lozupone and himself.

When the defendant gave him the check of September 30th, for \$300.00 he did not state it was for the outside work, and he, the plaintiff, applied it on the inside work.

Said plaintiff further testified that the defendant did not offer to allow him to enter the building at any time with the witness, E. M. Van Ness, as testified by him.

Said witness further testified that the lime and hair used on the Kalorama Apartment House was furnished by Knott & Moler. That he never pointed out to any of the witnesses or anybody else, the two Lozupones and Maraffo as being his partners.

And thereupon the witness, E. M. VAN NESS was recalled and testified in rebuttal in behalf of the plaintiff in substance, that the stucco work was a good job of work; that he did not find a great many trowel marks on the inside work; that the defendant did not offer to allow him to inspect the kitchens at that time, but stated that he had offered or proposed to Mr. Wheatley, the plaintiff's attorney, that he fix a time for the inspection of the work.

Thereupon the witness CHESTON testified that the character of the hair and lime used was as good as that of Knott & Moler's; that Knott & Moler sold their lime for ten cents more per barrel than the witness's firm, but he did not know how they managed to secure the difference in price, as he did not consider that Knott & Moler's lime was any better than the witness' firm's lime; that Knott & Moler occasionally bought lime from them.

Thereupon the case was announced closed and no other or further evidence was offered by either side.

Thereupon counsel for defendant moved the Court to instruct the jury to return a verdict for the defendant for the reason that it clearly appeared if anything was due for the work on account of the contract, it was due to the firm of the Italian Plastering Company, and the plaintiff being only one member of same, could not sue

alone, but the Justice presiding refused to give such instructions, to which refusal the defendant then and there duly excepted.

And thereupon the defendant's counsel prayed the Court to instruct the jury as follows:

1. If the jury find from the evidence that at the time of the doing of the work in question in this suit, the plaintiff had a partner or partners who were interested as such in the said work and entitled to share in the profits thereof, he can not recover in this action, and the verdict should be for the defendant.

2. The written contract for the work in question in this cause is dated July 30th, 1909, and provides that the work should be begun at once and completed within thirty (30) working days and further that if the work should not be completed within that time, the contractors should forfeit to the owner the sum of Ten Dollars (\$10) per day for each day, including Sundays, that the work
69 should remain unfinished. The jury are, therefore, instructed, that if they shall find from the evidence that the work was not completed on or before September 3, 1909, they should allow to the defendant from the contract price, \$10. per day for each day, Sundays included, after September 3rd, that the work remained unfinished.

3. The written agreement between the parties for the work in question provided that the price was to be paid when the work should be completed to the satisfaction of the defendant, Simmons; this would not permit Mr. Simmons arbitrarily and unreasonably to reject the work if done in a first class manner and in substantial compliance with the contract, but if you shall find from the evidence that the work was not done so as to make a first class job, so that Mr. Simmons had a right to be dissatisfied with it, then you are instructed that the plaintiff is not entitled to recover anything and the verdict should be for the defendant.

And thereupon the Court after ruling upon all the prayers offered, took a recess during the noon hour, and thereafter, before the argument of the case and before it was submitted to the jury, the defendant prayed the Court to instruct the jury as follows, prayer No. 4:

4. The jury are instructed that by the uncontradicted evidence in this case, the plaintiff had a partner or partners who were interested as such in the work in question and entitled to share in the profits thereof; for this reason, the plaintiff is not entitled to recover in this action and the verdict should be for the defendant.

But the Court refused to give any of said instructions so
70 prayed to each of which refusals the defendant then and there excepted.

Thereupon the Court, (Mr. Justice Barnard) instructed the jury as follows: Gentlemen of the jury, this is an action brought to recover five hundred and twenty-three dollars for labor and material furnished by the plaintiff to the defendant. There are three counts in the declaration, and I think they are all common counts for work and labor done and materials furnished. The first count is for three hundred dollars, claimed for the outside work on this

house, the structural work; the second count is for the balance on the inside work, two hundred and twenty-three dollars; and the third count simply embraces the two, and the whole claim is for five hundred and twenty-three dollars.

In order to recover, the plaintiff has to do two things, he has to show that he had a contract or a right to do this work at a fixed price; that he performed that work in a satisfactory manner, in accordance with this contract, and that he has not been paid. There seems to be no dispute between the parties with regard to the payments that were actually made.

The defendant says three hundred dollars was paid for the outside, structural work, leaving the whole balance whatever it is, for the inside work, on which he claims there was faulty work done. Plaintiff claims that the credit was placed on the inside work and that the three hundred dollars for the outside work is still due. But there is no dispute about the amount.

71 There is a contract put in evidence here, two papers which purport to make a contract, in which the amount of the inside work is stated to be, I think, nineteen hundred dollars; that is, that is the amount the work was to be done for. You have heard the papers read in regard to the character of the work that was to be done.

It is claimed by the defendant that the plaintiff was one of a partnership and that this contract was made with that partnership, and therefore, plaintiff has no right to sue on that partnership account and recover. On the other hand, the plaintiff claims that there was no partnership, and even if there was, that this contract was made by himself alone with the defendant, and he is, therefore, entitled to recover on it, whether there was a partnership or not.

If four men are engaged in business together in which they are to share in the profits and the losses of the business, ordinarily they are partners and they would be treated as partners. Notwithstanding that one of them might make a contract by himself to do a piece of work, to do it for the firm or the company, and one of them might receive the pay for it. You can always pay one partner of a firm and it will be payment to the firm. Payments that were made in this case were made the plaintiff alone. One of the checks it seems, was made payable to him for the alleged company, the plastering company, and perhaps one of them was endorsed by that company.

All those matters may help you to form a judgment here from all this testimony as to whether or not there was a partnership between

72 these four gentlemen or more gentlemen, whatever their number may have been; and also enable you to form an idea as to whether this contract was intended to be made with the partnership or whether it was a contract that was made evidently with this plaintiff in this case.

If the jury shall believe from the evidence that there was a partnership between the plaintiff and any of the other gentlemen named in the testimony, and that in fact the contract to plaster the defendant's house was a contract made with that partnership, then the plaintiff cannot recover in this action, because the other partner or

partners are not joined with him, no matter what the condition of the work was. That would be because of the defect of the parties here.

While the defendant might pay one partner and it would be a good payment as made to one partner dealing for the firm, yet if a partnership has a claim which they have to go into court and collect, they must all go into court. One can not sue for a partnership claim and collect it in an ordinary case. If that were the case, and there was a partnership and this contract was made with that partnership, and the plaintiff brings suit by himself, he could not recover.

If, however, the jury find from the evidence that there was no partnership in fact, or if there was a partnership existed in fact, and they find the contract was made by the plaintiff alone, or in his own name; and if they should further find that the work was done as agreed upon in good condition, then the plaintiff would be entitled to recover the amount claimed as unpaid. But if the jury find the work was not properly done as agreed upon, but that it was

73 defectively done, and that the plaintiff has already been paid all that the work so done was fairly worth, then their verdict should be for the defendant.

If, however, the work as done is fairly worth more than the plaintiff has been paid, then their verdict should be for the plaintiff for the balance fairly due him for such work, within the sum claimed,—that is, provided you find that he is entitled to bring suit, if the contract was made with him alone and he was entitled to bring suit. If he had not been paid what his work was worth, if his contract was not fully complied with and still his work is worth something—the suit is brought on quantum meruit—he would be entitled to recover what that amount might be, if it came within the five hundred and twenty-three dollars.

Claim is made by the defendant, of course, here that the cost of doing this work over again would be more than the balance of the sum alleged to be due on this accounting. If that is true, of course, and the plaintiff is entitled to recover, still you would find a verdict for the defendant. You could not find any balance over in favor of defendant, because there is no plea of set-off here. He simply claims that he is not indebted to plaintiff in any sum on account of this defective work, this contract not being carried out.

I think this case should be left to you twelve men as business men, men of good judgment and experience, to do what is right and fair between these two men and to decide on the facts from your best judgment.

74 You are to weigh the testimony. I cannot tell you which one to believe and which one not to believe; but you have the right to believe any of this testimony that strikes you as being true, or to refuse to believe any that you think is not true. This whole question is left to you as to whether or not plaintiff should recover in this case, and if so, how much; or whether you should find a verdict for the defendant.

When you retire to consider of your verdict, of course, you will select one of your number as foreman to announce your verdict.

Plaintiff in this case, having brought this charge, must make out a case by what we call a preponderance of evidence. For example, if he has simply brought a case which you are unable to say is stronger than the defendant's case, or simply balances the testimony in favor of defendant's case, or simply balances the testimony in favor of defendant's side, then he would fail, and your verdict would be for the defendant, because the plaintiff must overcome the inertia; the testimony must weigh heavier in favor of plaintiff than it does on the other side, and he has the burden of proof. Of course, the evidence must preponderate in his favor before he can recover at all; but if it does, and you find the facts on the theory I have suggested here, that entitled him to a verdict, then you should ascertain how much that should be, whether for the whole of the claim, or for a part of it, and what part of it; but if you find on the other side, that he has failed to make out his case and that your verdict is for the defendant, you simply find for the defendant generally.

75 And thereupon and before the jury retired counsel for defendant excepted to that part of the charge to the jury which reads "if the partnership existed and the contract was made by the plaintiff in his own name, he is entitled to recover," upon the grounds that the contract, as it appeared was not made in the plaintiff's own name, and upon the further grounds that if it had been made in his own name, or was in his own name, it was apparent that any money that was due under the contract for the work claimed to have been performed, was due to the members of the Italian Plastering Company, and not to the plaintiff, and, therefore, he could not recover in this action.

And the defendant excepted to that further part of the charge which stated "if however, the work as done, is fairly worth more than the plaintiff has been paid, then their verdict should be for the plaintiff for the balance fairly due him for such work, within the sum claimed—that is, provided you find that he is entitled to bring suit, if the contract was made with him alone, and he was entitled to bring suit. If he had not been paid what his work was worth, if his contract was not fully complied with and still his work is worth something—the suit is brought on quantum meruit—he would be entitled to recover what that amount might be, if it came within the five hundred and twenty-three dollars," upon the grounds that notwithstanding the fact there was no proof as to the value of the work outside of the contract, said charge in effect told the jury that they might find for the plaintiff the amount claimed, notwithstanding the work was not done as required by the contract, "if he had

76 not been paid what his work was worth." And excepted further to that part of said charge wherein the Court says in the same paragraph: "Still his work is worth something—the suit is brought on quantum meruit—he would be entitled to recover what that amount might be, if it came within the five hundred and twenty three dollars," upon the ground that there was no proof as to the

value of the work at all, and upon the further ground that the said charge was confusing to the jury and would mislead them.

And the defendant by his counsel prays the Court to sign and seal this, his said Bill of Exceptions, which contains the substance of all the testimony and evidence submitted to the jury at the trial, which is accordingly done, and the same is hereby made a part of the record on the appeal in this case, nunc pro tunc this 6th day of June 1911.

JOB BARNARD, *Justice*.

Order for Preparation of Record.

Filed June 14, 1911.

The Clerk will please prepare the record for the appeal in this case, and in doing so will include the following pleadings and papers:

Declaration	Filed Dec. 29, 1909.
Pleas	" Jan. 22, 1910.
Joinder of Issue.....	" Feb. 1, 1910.
Memo. of Verdict.....	" " 9, 1911.
77 Judgment	Filed Mar. 3, 1911.
Opinion of Court.....	" " 3, 1911.
Appeal	" " 4, 1911.
Citation	" " 4, 1911.
Memo. Appeal bond, Supersedeas.....	" " 16, 1911.
Bill of exceptions submitted.....	" Apr. 17, 1911.

MEMO.—Time to file record in Court of Appeals extended to June 30, 1911.

Order making Bill of Exceptions of record....	" June 6, 1911.
Bill of Exceptions.....	" 6, 1911.
This designation.....	"

A. A. BIRNEY,
Att'y for Appellant,
Pr. S.

Memorandum.

June 27, 1911.—Time to file transcript further extended to, and including, August 1st, 1911.

78 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 77, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, a copy of which is made part of this transcript, in cause No. 52255 at Law, wherein

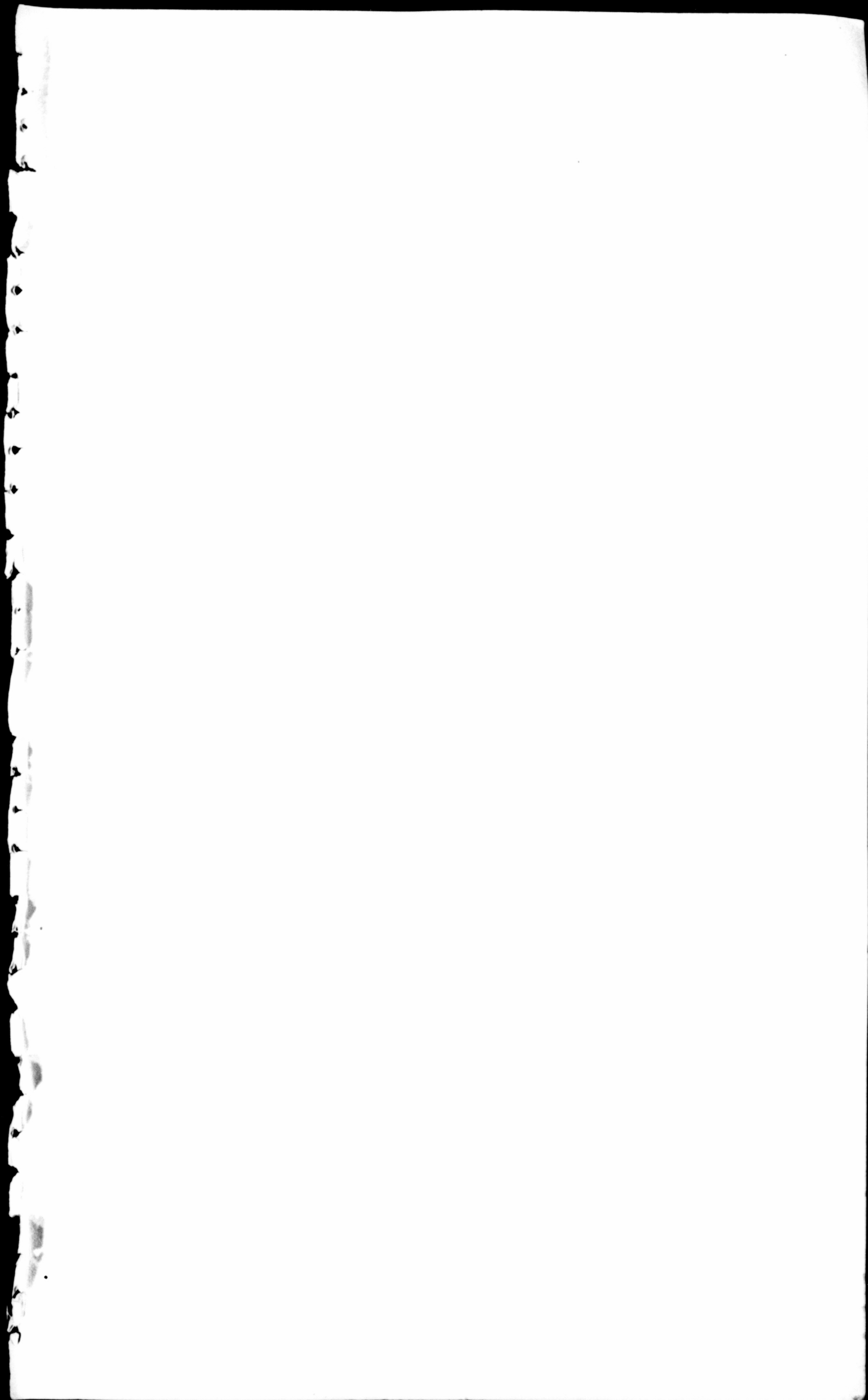
Emilio Jaselli trading as E. Jaselli & Bros., in Plaintiff and Leo Simmons is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of July, 1911.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2331. Leo Simmons, appellant, vs. Emilio Jaselli, trading as E. Jaselli & Bros. Court of Appeals, District of Columbia. Filed July 27, 1911. Henry W. Hodges, clerk.



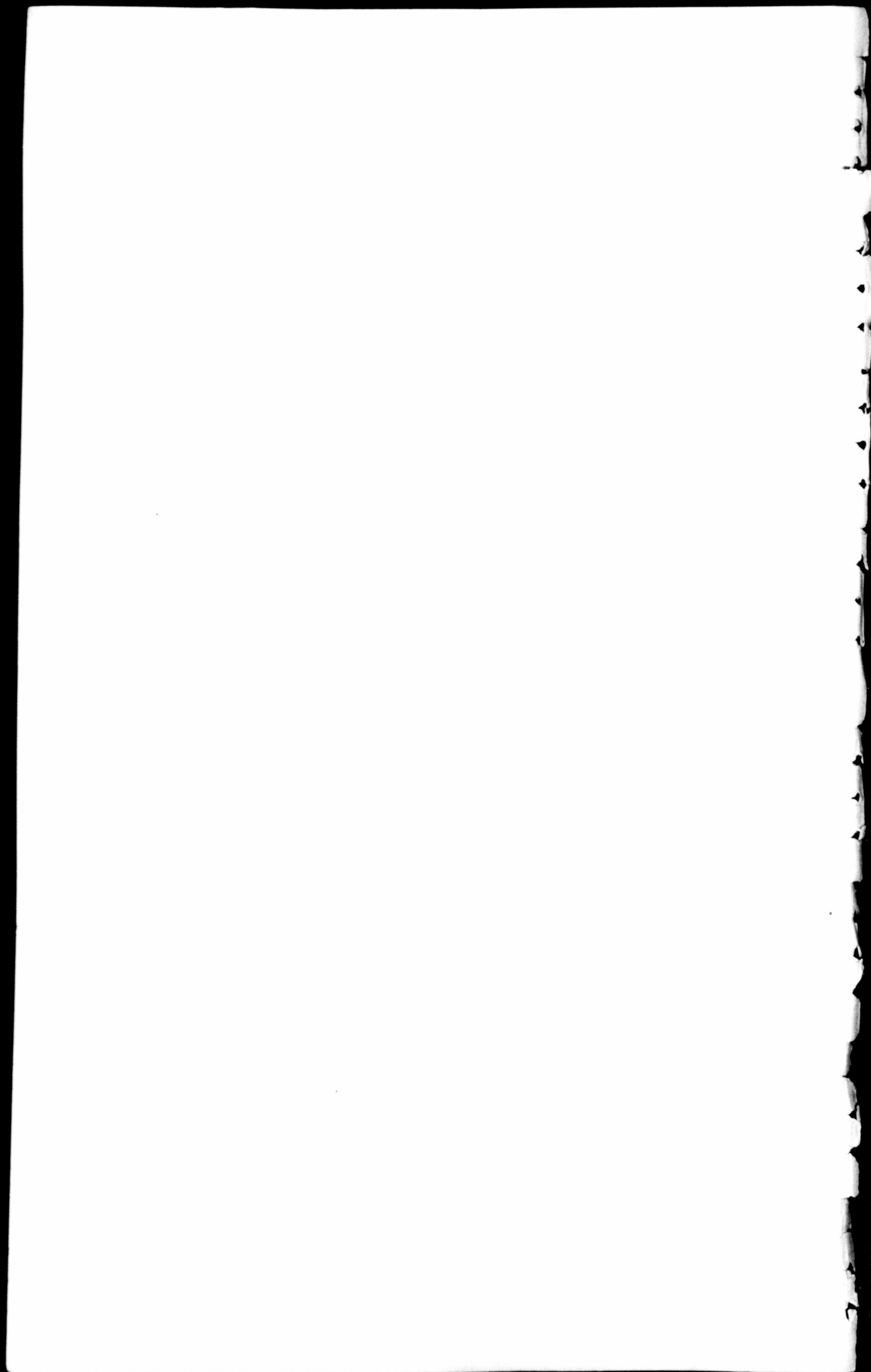
COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP-12-1911

W. H. H. H.

In the Court of Appeals of the District
of Columbia

WILLIAM H. H. H.



**In the Court of Appeals of the District
of Columbia.**

OCTOBER TERM, 1911.

LEO SIMMONS, *Appellant*,
vs.
 EMILIO JASELLI, trading as E. JASELLI & BRO. } No. 2331.

APPELLANT'S STATEMENT OF THE CASE.

The declaration is in assumpsit and in three counts:

1st. For work done and materials furnished between July 30 and October 30, 1909, in the building of a stucco exterior wall, \$300.00.

2nd. For work done and materials furnished between July 30 and December 18, 1909, in plastering interior walls, for which a balance is claimed of \$223.00, and

3rd. The common money counts, claiming \$523.00.

The plaintiff's affidavit repeats the claims of the declaration, and restates the dates as given.

The plea to each count is non-assumpsit, and the affidavit avers that the work in question was done by a firm known as The Italian Plastering Company, and not by the plaintiff, and further that nothing is due either the plaintiff or said firm.

On the trial it appeared that on June 24, 1909, the plaintiff delivered to appellant a bid for the doing of the work in question in the following terms:

THE ITALIAN PLASTERING CO.
FANCY MOULDINGS & CORNICE WORK OUR SPECIALTY.
2118 Pa. Ave.

Mr. Leo. Simmons, Kellog Bldg., City.

Dear Sir: We beg to submit estimate for plastering & lathing your apartment house on Mintwood Place for \$1,850, and stucco work on the front and part of said walls as specified for \$300.00, will use spruce laths and best materials of other description, will warrant to give good satisfactory work.

Yours truly,
ITALIAN PLASTERING COMPANY.
E. J.

Plaintiff while testifying in his own behalf, produced a writing made July 30, 1909, providing for *the interior plastering* at a cost of \$1,900.00, and signed "E. Jaselli & Bros., Leo Simmons." Before it was introduced, defendant's counsel, having objected and been allowed to cross-examine on the subject (Rec. 13), exhibited to plaintiff another writing, a duplicate of the first except as to signatures, which are "Italian Plastering Co., by E. Jaselli & Bros.; Leo Simmons," and having drawn from plaintiff the admission that this latter writing was signed and delivered by him to Mr. Simmons, and that the first offered writing was signed by him after leaving Mr. Simmons, and so far as appeared, had not been seen by the latter after such signing, objected to the introduction of the first paper, but was overruled, and both papers were admitted in evidence, an exception being taken.

Plaintiff then asserted that he was the Italian Plastering Company and that he so informed Mr. Simmons (Rec. 15); that he had no partners, but only agents to do the work, to whom he paid wages. This was denied by the appellant who testified that when he prepared the agreement in duplicate he supposed that the three men, Stephano Lozupone, Luigi Lo-

zupone and Denato Maraffo were the brothers of the plaintiff, associated with him as E. Jaselli Brothers, and learned to the contrary from the plaintiff only at the time of the signing of the writing produced by him, and that plaintiff then told him the plastering business was carried on by him and the two Lozupones and Maraffo, who composed The Italian Plastering Co. (Rec. 28).

Other witnesses testified to declarations by plaintiff that Stephano Lozupone was one of his partners in the plastering business (Frank Beall, Rec. 36, 37; Edward McGee, Rec. 37; Howard M. Etchison, Rec. 38), and Stephano Lozupone testified that the Italian Plastering Company was a firm composed of Emilio Jaselli, Stephano Lozupone, Louis or Luigi Lozupone and Donato Maraffo; that each was to have a per diem wage and an equal share of the profits (Rec. 32, 33).

The witness was supported by an account rendered by plaintiff of his receipts and outlays on account of Italian Plastering Company (Rec. 18), in order to defeat suits for wages by Maraffo and Luigi Lozupone, which suits were abandoned by their attorney when convinced by the plaintiff that there was a partnership (Mr. Paladini's Test., Rec. 33, 34).

It also appeared conclusively that the work was not completed "within thirty working days," as stipulated in the agreement, this period terminating on September 3, 1909. Plaintiff testified that he "Got through the solid plastering *some time in September, about the beginning of October*" (Rec. 25), and that other work of putting up mouldings and plastering the cellar was done later (see also Demonet's test., Rec. 27); while the testimony for defendant was to the effect that the plastering was not finished until after December 1, or four months after the contract was signed (Rec.

31), and was so badly done that defendant was forced to lay out large sums in attempting to correct it (Rec. 30). The declaration also fixes the latest date as December 18.

The claims of the defendant were:

(a) That the right of action (if any), was in the members of the Italian Plastering Company, and not in Emilio Jaselli alone.

(b) That plaintiff, not having given evidence of the value of the work and materials, but resting wholly on the written agreement, could not recover upon a *quantum meruit*, or otherwise than by showing a *compliance with the contract* in all particulars, and having affirmatively disproved such compliance, could not recover at all.

(c) That defendant was entitled to a deduction of \$10.00 a day from the contract price for each day after the thirty (30) days specified for the completion of the work.

(d) That the contract having specified that the work should be completed to the satisfaction of Mr. Simmons, and he having shown that he had rejected it as not satisfactory, and that he had abundant reason for such action, the plaintiff could not recover.

ASSIGNMENTS OF ERROR.

The Court erred:

1. In admitting in evidence for the consideration of the jury the writing produced by plaintiff, and found on pages 12 and 13 of the record as the contract between the parties.

2. In submitting to the jury the question whether the right of action under the contract was in the plaintiff or in the members of The Italian Plastering Company.

3. In instructing the jury that if a partnership existed and the contract was made by the plaintiff, in his own name, he could maintain the action.

4. In refusing to instruct the jury that the plaintiff having sued on common counts, for work and labor done and materials furnished, and having given no proof of the value of the labor or material he could not recover (Rec. 28).

5. In instructing the jury that although the plaintiff had not fully complied with his contract, yet if his work was worth more than the amount he had been paid he would be entitled to recover such excess, if it came within the amount of his claim.

6. In rejecting the defendant's first prayer for instruction.

7. In refusing to instruct the jury that if they should find from the evidence that the work was not completed within the time fixed by the contract they should allow the defendant from the contract price \$10.00 for each day of overtime, as provided in the contract and as prayed in the defendant's second prayer for instruction.

8. In rejecting the defendant's third prayer for instruction and thereby refusing to give effect to that provision of the contract that the work should be done to the satisfaction of the defendant.

9. In rejecting the defendant's fourth prayer for instruction.

ARGUMENT.

Errors one to three, six and nine, may be considered together.

The duplicate copy of the contract, offered by plaintiff, was wrongfully admitted in evidence.

The right of the plaintiff to sue alone on this claim was contested from the first. If the contract was a partnership contract, even if made by Jaselli alone, he had no right of action to recover what might be due upon it, the right of action being joint in the associates. The question is not who made a partnership contract, but to whom is the money

due under a contract made in behalf of a firm, or who earned the money ensuing from the work contracted to be done, if any was due.

Gage vs. Rollins, 10 Mect. Mass., 348-354.

One partner cannot maintain an action at law even for his share of a debt due the partnership.

Vinal vs. West. Va. Oil & Land Co., 110 U. S., 215.

The signature which Jaselli affixed to the contract was of great importance to this question as showing the intent of the parties at the moment of their signing. The Italian Plastering Company's name was put to the paper in the presence of Mr. Simmons. The contract was not executed by Jaselli & Bros., but by The Italian Plastering Company, the name being put there by E. Jaselli; Mr. Simmons having accepted this signature would not be allowed to deny that the company was the contractor. If he is so bound, certainly the man that had the power to bind himself and purposely avoided doing so, cannot claim he was intended to be the contractor. Upon what theory may another paper, differently signed and never seen by the other party to it, in its completed condition, nor assented to by him at any time, be offered in evidence against him?

At what time this copy was signed by Jaselli, whether immediately before the trial or before bringing suit and after he had determined to repudiate the partnership, does not appear, but in any event, it is a self-serving document, which must be without probative force as against this appellant, who never saw it and had no right to suppose it to be so signed. To admit it in evidence and thereby enable counsel to contend that it shows the intent of Jaselli to contract for himself was flagrant error.

The case of the Sun Printing and Publishing Company vs. Moore, 183 U. S., 643, see 645, shows a contract, in form almost identical with the one in this case.

In that case the contract was made by and between "W. Moore, by Thos. Manning, his agent, *of the first part, 'called the owner,'* and Chester S. Lord, *of the second part, 'called the hirer,'*" and was signed

*"Thos. Manning,
Chester S. Lord,*

For the Sun Printing and Publishing Co."

This contract was held to be the contract of the Sun Publishing Co.

The only difference (and it makes the contract in question stronger in favor of the appellant) is that instead of the appellee signing *for* the Italian Plastering Company as Lord signed for Sun Printing Company, he signed "Italian Plastering Co., by E. Jaselli & Bros." (Rec. 14).

The proposal under which all the work was undertaken is signed in the same way (Rec. 16).

It seems incredible that the fact about the signing of this contract could be as testified by the appellee (Rec. 15). Appellee testified, "I told him I was The Italian Plastering Co.; he said he had looked us up and he would not give it to The Italian Plastering Co." If such was the fact, how could it be supposed that Simmons would have accepted a contract from the very parties he would not contract with?

The original paper left with Simmons and signed by the parties in his presence was the only contract he accepted. He had no knowledge of the way the copy was executed by the other contracting parties until the trial. Such being the case, how could he be prepared to defend against it, and under what principle may it be used against him? As this contract was signed The Italian Plastering Co., by its agent, Simmons knowing the circumstances, would not have been

permitted to offer evidence to contradict or vary its words. With whom did the appellant contract, according to the plain words of the paper? Not with Jaselli & Bros., for they did not sign it. The name of Jaselli & Bros. was put to the paper simply to show that the Italian Plastering Co. had acted through another in executing it as an officer of any company would do. This is the only way a corporation or society can act.

Whose mind did the appellant's mind meet in this contract? In making contracts, the law is plain that the minds of the contracting parties must meet and agree to the same thing. This, of course, does not mean that the party to be bound must be actually present to confer; his agent may do so, but the minds of the parties must meet and agree to the same thing at the same time. The principal is bound by the contract only by reason of the agent's authority. In such case the mind of the agent acts for the principal.

The party signing a contract may show that he disclosed his principal and signed for such; but we find no case where the party making the contract signed another name, instead of his own, yet contended that it was his contract. If he intended it as his contract, why did he put another name? If the suit had been against the appellee by the appellant, what a difference it would have made. Undoubtedly he would have said he was not individually bound, and rightfully so, because *he* did not execute the contract; he signed another's name and added his. For what purpose? Not to become a party to the contract, but to show the manner and by whom The Italian Plastering Company executed the paper.

Long vs. Colburn, 11 Mass. 97, *in point*.

Wildcat Ranch vs. Ball, 45 Ind., 213.

Grafton vs. Cummings, 99 U. S., 100.

McWilliams vs. Laules, 2 Gray, 387.

Rice vs. Cove, 22 Pick., 158, in point.
Campau vs. Lafferty, 43 Mitch., 429.

The instruction that plaintiff might maintain the action, if the contract was *in his own name*, although a partnership in fact existed is legally indefensible, the writing not being under seal. The rule is that if a simple contract be made for or on account of a partnership, all the partners must unite in an action to enforce it; the *name* in which it is made is immaterial. The Court *looks beyond mere names and forms and sees who are the real parties* and treats them as the persons who are to enforce or defend their contracts.

Gage vs. Rollins, 10 Metc. (Mass.), 348-354.
Seymour vs. Western Ry. Co., 106 U. S., 320.
Wetherell vs. Livingston, 1 Exch., 644.
Bennett vs. Scott, 1 Cranch C. C., 339, in point.
Gilbert vs. Lichtenberg, 98 Mich., 417.
Speake vs. Prewett, 6 Tex., 252, in point.
Creel vs. Bell, 2 J. J. Marsh., 309.
Fish vs. Gates, 133 Mass. 441.

The evidence of partnership was conclusive, and the Court should have so held. Plaintiff bid for work in the name Italian Plastering Company; he signed the contract "Italian Plastering Co. by E. Jaselli & Bros.;" the first check he received from plaintiff for \$600, Sept. 4, 1909, was "For Italian Plastering Co." (Rec. 29), and he defeated two actions brought (through mistake of their attorney) by two of his associates by representing that they were his partners and not his employees; and he rendered the statement of account naming them as his partners; while a third associate testifies to the partnership (Rec. 32, 33). To per-

mit a jury, in face of such proofs, to find that there was no partnership is an incentive to false swearing.

If the Court, after refusing to instruct the jury as requested, had adhered to the first part of its charge, the verdict doubtless would have been different, but what he said in the beginning (Rec. 40) was completely destroyed by the latter part of the charge.

FOURTH AND FIFTH ASSIGNMENTS.

THERE WAS NO FOUNDATION IN PROOF FOR A RECOVERY UPON A QUANTUM MERUIT.

The trial judge instructed the jury that if plaintiff did not comply with his contract and *yet his work was worth something*, he would be entitled to recover what that amount might be (Rec. 41), and this was duly excepted to (Rec. 42). This was directly opposed to a previous part of the charge that in order to recover the plaintiff must show "that he performed the work in a satisfactory manner in accordance with the contract" (Rec. 40). Besides being confusing as a contradiction of the earlier statement it was erroneous, for plaintiff had given no proof whatever *of value of the work*. He had stood upon his claim for recovery *on the contract* as written, and this being so was bound to prove compliance with that contract.

Cutter vs. Powell, 2 Sm. Lead Cas., 8th ed. top pp. 1, 17, 21, 46.

Instead of proving compliance with the contract his declaration suggested its violation in respect of the time for completion and his proof affirmatively established it, as also the further fact that it was not satisfactory. He had no right then to recover *on the contract*, and had no proof to

establish a *quantum meruit*. The contract being discarded were the jury to guess at the value of the work done?

The rule is declared by Bayley J. in Chappel vs. Hicks, 2 C. & M., 214: "If the contract be not faithfully performed the plaintiff shall be entitled to recover only the value of the work and materials supplied."

For an English decision directly in point upon the facts, see Munro vs. Butt, 8 E. & B., 738 (stated at large in 2 Sm. L. C., top p. 23).

See also Dermott vs. Jones, 2 Wall., 1.

"The plaintiff must in all cases be prepared to prove the amount of the damages he has sustained."

1 Saunders Pl. & Ev., p. (star) 239.

SEVENTH ASSIGNMENT.

The defendant was entitled to an allowance from the contract price of \$10 for each day of delay in completion of the work beyond thirty working days.

The contract provided "Work to be begun at once and completed within thirty working days," and for a forfeit of \$10 for each day over that time, including Sundays, the work should remain unfinished. The thirty days expired September 3, and it was shown by plaintiff on the witness stand and by his witnesses, as also by defendant, that a large part of the work was done after that time (Jaselli, Rec. 24, 25; Demonet, Rec. 27; Simmons, Rec. 31), and the declaration and affidavits show the work was not done until December 18, and on the testimony of plaintiff and Mr. Demonet, his witness, defendant was entitled to an allowance for at least 65 days, an amount greater than plaintiff's claim. The defendant's evidence (Rec. 31) shows that he sustained great loss by the delay, yet the Court rejected the

defendant's prayer. Under the law the instruction should have been given.

Emack vs. Campbell, 14 App. D. C., 186.

Sun Printing Co. vs. Moore, 183 U. S., 642.

U. S. vs. Bethlehem Steel Co., 205 U. S., 105, 119.

It is not easy to understand how the Court below reached the conclusion that the contract in this case was intended "as a forfeit money or penalty."

He says that "the evidence tended to show that the delay was occasioned by the building not being ready for the plasterers." The evidence conclusively shows to the contrary. The appellee made no such contentions. He says in his declaration and affidavit that the work was done between July 30 and December 18, and it is proved by numerous witnesses that the work was ready to be begun in accordance with the contract "at once."

The only witness who testified to any delay was a lather by the name of Jones (Rec. 26). He said, "The work was not ready when they first went there, and he thought they had to wait about 3 weeks," but he does not show in what way the work was not ready or give any certainty whatever about it. McGee, superintendent of the building, said (Rec. 27), "The building was ready for plastering by August 1, excepting a small amount of work to be done on the fourth floor and that only took a day or two to get that finished."

The defendant testified (Rec. 31), "That the building was all ready for the work of the Italian Plastering Company when the contract was signed; and it *did begin same on or about the first day of August, 1909.*

Besides, the contract having required the work to be begun "at once," it was incumbent upon the company or the

appellee to see that it was ready before signing the contract, or else to prove that (he or) the company was deceived as to the question of fact, whether or not the work was ready at the time, and it was also his duty to show exactly when it was ready and when the work was begun and at what time it was finished.

Therefore the Court not only erred about the facts of the case but also about the law. That this \$10 per day reduction was not intended as a penalty or as forfeit money as is contended is plain upon the face of it. It provides not only that the \$10 should be allowed for each working day, but includes Sundays as well. The reason for this is clear; the appellant would lose as much on Sunday if the work was not completed, as he would any day in the week. It needs no proof to show that an apartment house building should be ready for the occupancy of the tenants at an as early date as possible. It seems that the Court should take into consideration the fact that delay in finishing a building of this character would necessarily cause loss to the owner, for he can get return from his investment only by having the building occupied.

The contract comes clearly within the reasoning of the Supreme Court of the United States in the *Sun Printing Company against Moore*, 183 U. S., see 674. In that case the Court said:

“When the parties to a contract, in which the damages to be ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages, in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts that will enable a court of law to say that they intended something else.”

THE EIGHTH ASSIGNMENT.

The Court erred in rejecting the appellant's third prayer and refusing to give effect to that provision of the contract that the work should be done to the satisfaction of the appellant.

Under the contract the price for the interior work was to be payable when the work should be "completed satisfactorily to Mr. Simmons" (Rec. 13). It was shown that it was not satisfactory to him, and was so done as to make his objections unanswerable. (See testimony of John Simmons, George E. Barber, John J. Early and Frank Beall, Rec. 34 to 36.) *Since the plaintiff stood on his contract and offered no proof of the value of the work*, the showing that it was not satisfactory was a complete answer to his action. That a contractor who consents to such a provision in his contract is bound by it is settled beyond dispute. In the case of machinery or chattel of any kind the objection that it is not satisfactory is conclusive; in the case of improvement to fixed property the contractor must show the value of what he has done or furnished and cannot take back. *In this case there was no proof of value.* In permitting a recovery without such proof the Court refused effect to a valid condition of said contract.

Dermott vs. Jones, 2 Wall., 1.

Silsby Mfg. Co. vs. Chico, 24 Fed., 893.

Lee vs. New Haven R. R. Co. 15 Fed. Case No. 8, 197.

In considering the fairness of the appellant's action in his refusal to accept the work as being satisfactory to him, we especially call the Court's attention to the evidence of the following witnesses in addition to the appellant's, namely,

John Simmons, George E. Barber and Edward McGee (Rec. 34-37).

It will also be seen by the plaintiff's witnesses (Rec. 26-27) that none of them were willing to testify that the work was in accordance with the written proposal or the contract. In the proposal the following words are used, "will warrant to give good satisfactory work" (Rec. 16). By the contract it is provided "The material to be furnished * * * , so as to make a first class job of work" (Rec. 13).

Witnesses for plaintiff stated as follows:

James Nolan, the first one called as to the plastering (Rec. 26), "found it was a kind of sand finish and a fairly good job according to that class of work."

John Hughes (Rec. 26), "That it was a fairly good job of work."

John Lynch (Rec. 26), "A good, first class job for that kind of work."

E. M. Vacco (Rec. 26), "All good work according to that kind."

E. M. Van Ness (Rec. 27), "That he examined the plastering in the halls and would say that it was an average good job."

While the defendant's witnesses, all of whom showed themselves to be experts, stated:

John Simmons (who is no kin to the appellant) (Rec. 34) "That the work was never finished, simply having two coats of brown mortar on them, and left in a rough state ready for white coating or sand finishing. That the work as it was left was in an unfinished condition and a very poor finish at that, it was neither sand finish or white coat and that the cost of either sand finish or white coat would amount to about one-third of the whole cost of plastering."

George E. Barber (Rec. 35), "That the kitchens, bath

rooms and public corridors were left in an unfinished condition, having only two coats of brown mortar on same; that the rooms and corridors referred to were at the time the plastering was stopped on same, ready to receive what is known as white coat, which is finished in a hard white finish in plaster of paris and lime, or sand finish which is composed of lime slacked into a soft putty plaster and sand; that the walls and ceilings in said corridors, bath rooms and kitchens had not received a coat of white coating or sand finish; that he considered the plastering in said kitchens, bath rooms and corridors in an unfinished condition. That as he looked at the work, the job was not finished and was in a very poor condition, even for white coating or sand finishing; to his knowledge he never saw a residential building left in that condition, it neither being white coated or sand finished. That he found the plastering in many of the dining room ceilings cracked and it looked to him as if many of them would have to be taken down."

John Early (Rec. 36), "That the work appeared to have only two coats of brown mortar, possibly one coat of what is known as 'laid on work.' That 'laid on' plastering was as good as what is called 'three coat work,' excepting that it took less time to put it on and was a saving in scaffolding. That the work was not finished in a sand finish or in a white coat, and that the character of work he would say was very poor. That the cost of the sand finish or white coating was about the same, and that a building left without sand finish or white coat would be in an unfinished condition."

Frank Beall (Rec. 36), "That he was surprised when he heard the plaintiff say that the work was finished; that he had been painting over all kinds of walls in the last thirty years, and had never seen anything to equal the poor character of work; that defendant had paid him \$75.00 for do-

ing the work made necessary by reason of the work not being sand finished in the corridors, and it had cost as much, at least, to purchase the materials to do same; that he had heard the defendant in the case complain to the plaintiff time and time again of the bad condition of the walls and ask him to correct same; but he had declined to do so as far as he knew."

Edward McGee (Rec. 37), "That he heard the defendant complain to the plaintiff about the way the plastering was done in the kitchens, bath rooms and corridors and heard him say it was not a sand finish, and asked the plaintiff to try and help him to do something with it to put it in a condition so that it would be a passable job for residential purposes."

The judgment should be reversed.

Respectfully submitted.

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